

***United States Court of Appeals
for the Second Circuit***



APPENDIX

1489 811 812

77-~~8124~~

UNITED STATES COURT OF APPEALS
For the Second Circuit

B p/s

Docket No. 77 - 8124

UNITED STATES OF AMERICA,

Appellee

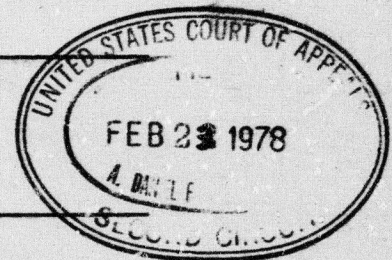
-against-

PETER FRANK GIATTINO and
PATSY JOHN RAUCCI,

Appellant.

On Appeal From The United States
District Court For The Eastern District
Of New York

APPELLANTS' APPENDIX



JAMES A. PASCARELLA
Attorney For Appellant
One Old Country Road
Carle Place, New York 11514
(516) 742-1134

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PAGINATION AS IN ORIGINAL COPY

APPEAL

Disp./Sentence **GIATTINO, PETER FRANK** (LAST, FIRST, MIDDLE) **11-12-76** **76** **714** **1**
 JUVENILE No. of Def's *** 2** Yr. Docket No. Del.

OFFENSES CHARGED **ORIGINAL COUNTS**
5861 did possess destructive devices **3**
 which were made without complying
 with the provision of T-26, U.S.C.
 Sec. 5822.

PLACED

U.S. MAG. CASE NO.

BAIL • RELEASE

☐ Denied ☐ AMT ☐ Fugitive
☐ Set ☒ Pers. Recog.
☐ PSA

\$ 10,000 conditions

☐ Date ☐ 10% Deposit
☐ Surety Bond
☐ Bail Not Made ☐ Collateral
☐ Status Changed (See Docket) ☐ 3rd ☐ Pity Cust ☐ Other

SENTENCE

Disposition of Charges **5 years**
☒ Convicted ☐ On All Charges
☐ Acquitted ☐ On Lesser Offense(s)
☐ Dismissed ☐ WOP: ☐ WP
☐ On Government's Motion

II. KEY DATES & INTERVALS

ARREST or	INDICTMENT	ARRAIGNMENT	TRIAL	SENTENCE
U.S. Custody Began	High Risk Date 11-12-76	Information ☐	Trial Set For 3-23-77	Voir Dire ☐
Summons Served	Indict. Waived ☐	1st Plea 11-19-76	☒ NG ☐ G ☐ NOL	Trial Began 4-27-77
First Appearance	In Charging District	Superseding ☐ Indict/Info ☐	{ G. Plea W/Drawn	Trial Ended 5.6.77
		Final Plea	☐ NG ☐ G ☐ NOL	

MAGISTRATE		DATE	INITIAL/NO.	INITIAL/NO.	OUTCOME:
Search Warrant	Issued				☐ DISMISSED
	Return				☐ HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT
Summons	Issued				☐ HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW
	Served				
Arrest Warrant Issued					
COMPLAINT					
OFFENSE (In Complaint)					

U.S. Attorney or Asst.

ATTORNEYS

Defense ☐ CJA ☒ Ret. ☐ Waived ☐ Self ☐ None / Other ☐ PD ☐ CD

Gary A. Woodfield
Edward Thompson
Ronald Russo

James Pascarella
 One Old Country Road
 Carle Place, NY (516) 742-1134

* Show last names and suffix numbers of other defendants on same indictment/information:

PASQUALE JOHN RAUCCI 2.

EXCLUDABLE DELAY
 (e) (b) (c) (d)

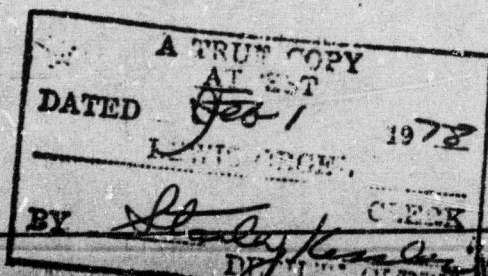
DATE	(DOCUMENT NO.)	PROCEEDINGS
11-12-76		Before Catoggio - Indictment filed.
11-19-76		Before Pratt, J.- Case Called. Deft. & Counsel present. Deft. waives the reading of the Indictment. Deft. arraigned and after being advised of his rights and on his own behalf enters a plea of nnt guilty. Bail set at \$10,000 P.R. as to the deft. Adj'd. to 1-5-77 at 1:45 P.M. for Criminal status Conference.
1-5-77		Before PRATT, J.- Case called for conf and adjd to 2-23-77 to select a jury
1-5-77		Notice of appearance for both defts filed.
1-6-77		Notice of readiness for trial of USA filed.
3-23-77		Before Pratt, J.: case called - defts and counsel present- trial ordered and begun- trial to resume at a later date. Jurors selected
4-27-77		Before PRATT, J.- Case called for trial. Trial ordered add begun. Jury selected. Trial to resume after civil trial in case Owens vs Japan Lines
4-27-77		By Pratt, J.- order dtd 4-27-77 concerning alternate jurors filed.

DATE	IV. PROCEEDINGS (continued)	PAGE TWO	V. EXCLUDABLE DELAY				For Part alone US
(DOCUMENT NO.)			Interval Section (a)	Start/End Date (b)	Code (c)	Total Days (d)	A
5-2-77	Before PRATT, J.- Case called for trial. Trial resumed. Jury sworn. Govt opens. Deft waives opening statements. Trial to resume on 5-3-77						
5-2-77	Before PRATT, J.- Suppression hearing ordered and begun. Both sides present oral arguments. Motion to suppress certain evidence. Motion granted and denied in part						
5-3-77	Before Pratt, J.- case called - defts and counsel present-trial resumed - trial continued on 5/4/77 at 10:00 AM.						
5-4-77	Before PRATT, J.- Case called for trial and resumed. Govt rests. Defts motion for judgment of acquittal and to dismiss ct. one, motion argued. Motion denied for judgment of acquittal. Decision reserved on motion to dismiss ct. one. Trial to resume on 5-5-77						
5-5-77	Before PRATT, J.- Case called for trial and resumed. Govt reopens its case with permission of the Court. Govt rests. Trial to cont on 5-6-77						
5-6-77	Before Pratt, J.- case called - defts and counsel present-trial resumed - defts renew their motions to dismiss- The Court grants the motion as to counts one and three - denied as to Count two - Court charges jury at 3:20 PM -Alternate jurors discharged - Marshals sworn - jury returns with a verdict of guilty on count two of the indictment as to both defendants - trial concluded - jury discharged - bail cont'd.						
6-1-77	Notice of motion ret, 6-16-77 with memo of law to set aside the verdict.						
6-14-77	USA affidavit in opposition to defts motion for judgment of acquittal filed.						
7-7-77	Befroe PRATT, J.- Case called to motion to set aside jury verdict. and adjdj to 7-14-77 for hearing						
7-21-77	Before Pratt, J.- case called - defts and counsel present-hearing on motion to set aside jury verdict ordered and begun -hearing concluded - decision reserved.						
8-2-77	Government's memorandum in opposition to defendants' motion to set aside the jury verdict filed.						
8-11-77	By Pratt, J. -Memorandum and order dtd 8-11-77 denying the defts' motion to set aside the verdict and to enter a judgment of acquittal or in the alternative to order a new trial filed. Copies mailed to parties.						
8-25-77	Letter dtd. 8-19-77 from deft counsel to J. Pratt re: reconsideration of court's order dtd. 8-11-77 filed.						
8-25-77	By PRATT, J.- Order dtd. 8-24-77 denying defts mtoion for reconsideration of court's order dtd. 8-11-77 filed.						
9-1-77	Before Pratt, J.- case called - defts Raucci and Giattino present with counsel- deft Giattino sentenced on count 2 to : imprisonment for a period of 5 years - stay of execution of sentence pending the determination of appeal. Deft Raucci sentenced to imprisonment for a period of 6 years - stay of execution of sentence pending determination of appeal. Counts 1 & 3 were dismissed in open court on May 6, 1977						

FINE AND RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
9-1-77	(Document No.) Judgment and commitment filed. Certified copies to US Marshal, Probation and US Atty.				
9-12-77	Notice of motion ret. 10-6-77 for an order granting a new trial filed.				
11-1-77	GOVERNMENT'S memorandum in opposition to defendants' motion for a new trial filed with affidavit of Ronald Russo in opposition to motion for new trial.				
11-4-77	BY Pratt, J.- memorandum and order dtd 11-4-77 denying defts' motion for a new trial etc. filed. Copies mailed to parties.				
11-14-77	Notice of appeal filed. Docket entries and duplicate of notice mailed to the court of appeals.				
11-18-77	XXXXXXXXXX By Pratt, J- Order filed apptg counsel.				
12-5-77	Record on appeal certified and mailed to Court of Appeals. (With Form A) sk				
12-7-77	6 transcripts filed (dated 9-1-77; 5-2-77; 5-3-77; 5-4-77; 5-5-77 and one dated 5-6-77 respectively)				
12-7-77	Supplemental index to record on appeal mailed to the court of appeals (certified)				
12-9-77	Acknowledgment filed received from the c of a for receipt of supplemental record on appeal.				
12-28-77	Authorization for payment of expert services filed. (Ray Stalker, Court Reporter) mg				
12-29-77	Stenographer's transcript dated 7-21-77 filed. sk				
1-5-78	Scheduling order filed recvd from the court of appeals that defts atty James Pascarella to submit a completed voucher on or before March 8, 1978: argument of the appeal to be heard during the week of 3-13-78: Govt to file its brief on or before 2-27-78 etc.				
1-19-78	Voucher for expert services filed for Maurice Davis Court Reporter and forwarded for payment				
1-27-78	Scheduling Order dated 1-23-78 received from the Court of Appeals amending the Order dated 12-30-78 and docketed 1-5-78 as follows: a copy of the transcript of testimony shall be filed with the Clerk of the District Court on or before 2-3-78, the brief and appendix of appellant filed before 2-21-78, the United States' brief filed before 3-23-78, James Pascarella shall submit a completed voucher (CJA-20) before 3-29-78, and the argument of the appeal shall be heard during the week of 4-3-78. sk				



FELONY Fel ☒ District Office ☐ Sentence ☒ RAUCCI, PASQUALE JOHN (LAST, FIRST, MIDDLE) 11 12 76 714 2 No. of Defs * 2 JUVENILE U.S. MAG. CASE NO.

U.S. TITLE/SECTION T-26, U.S.C. 5861 (c) (d) & (i), 5822 & 5871; T-18, U.S.C. 2 OFFENSES CHARGED did possess destructive devices which were made without complying with the provision of T-26, U.S.C. Sec. 5822. ORIGINAL COUNTS 3

BAIL • RELEASE
AMT ☐ Denied ☐ Set ☒ Fugitive ☐ Pers. Recov. ☐ PSA
\$10,000
Date ☐ Bail Not Made ☐ Status Changed (See Docket) ☐ 10% Deposit ☐ Surety Bond ☐ Collateral ☐ 3rd Prty Cost ☐ Other

II. KEY DATES & INTERVALS

ARREST or U.S. Custody Began High Risk Date 11-12-76 INDICTMENT Information ☐ 11-12-76 Arraignment 11-19-76 TRIAL 3-29-77
Summons Served Indict. Waived ☐ 11-19-76 1st Plea NG ☐ G ☐ NOL
First Appearance In Charging District Superseding ☐ Indict/info ☐ Final Plea ☐ NG ☐ G ☐ NOL
Trial Began 4-27-77
Trial Ended 5-6-77

SENTENCE 6 yrs
Disposition of Charges ☒ Convicted ☐ Acquired ☐ Dismissed
☐ On All Charges ☐ On Lesser Offense(s) ☐ WOP ☐ WP ☐ On Government Motion

MAGISTRATE	
DATE	INITIAL/NO.
Search Warrant Issued	INITIAL APPEARANCE DATE
Summons Issued	PRELIMINARY EXAMINATION OR REMOVAL HEARING
Arrest Warrant Issued	DATE Scheduled
COMPLAINT	DATE Held
OFFENSE (In Complaint)	WAIVED NOT WAIVED Tape Number
	INTERVENING INDICTMENT
	OUTCOME: ☐ DISMISSED ☐ HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT ☐ HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW

U.S. Attorney or Asst.

Ronald Russo
Gary A. Woodfield
Edward Thompson

FOR BOTH DEFTS
JAMES A. PASCARILLA
One Old Country Road
Carle Place, N.Y., (516) 426 742-1134

* Show last names and suffix numbers of other defendants on same indictment/information:

PETER FRANK GIATTINO 1.

DATE	PROCEEDINGS
11-12-76	Before Catoggio - Indictment filed.
11-19-76	Before PRATT, J.- Case Called. Deft. & Counsel present. Deft. waives the reading of the Indictment. Deft. arraigned and after being advised of his rights and on his own behalf enters a plea on not guilty. Bail set at \$10,000 P.R. as to the deft. Adj. to 1-5-77 at 1:45 P.M. for Criminal Conference.
1-5-77	Case called for conf. Defts and counsel present, Before PRATT, J. Case adjd to 2-23-77 to select a jury
1-5-77	Notice of appearance filed for both defts filed.
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PROCEED

DOCUMENT NO.	Description	Section # (a)	Start Date and Date (b)	Ltr. Code (c)	Total Days (d)
5-2-77	Before PRATT, J.- Case called for trial. Trial resumed. Jury sworn. Govt opens. Deft waives opening statements. Trial ends to resume on 5-3-77				
5-2-77	Before PRATT, J.- Case called for trial Hearing ordered and begun for suppression hearing. Both sides present oral arguments. Motion to suppress ceertain evidence. Motion granted and denied in part				
5-3-77	Before Pratt, J.- case called - defts and counsel present- trial resumed - trial continued on 5/4/77 at 10:00 AM.				
5-4-77	Before PRATT, J.- Cascalled for trial and resumed. Govt rests. Defts motion for judgment of acquittal and to dismiss ct. one, motions argued. Motion denied for judgment of acquittal. Decision reserved om motion to dismiss ct. one. Trial to resume on 5-5-77				
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FINE AND RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

RAUCCI, PATSY JOHN

76 714

Yr. Docket No. Def.

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
9-1-77	Judgment and commitment filed. Certified copies to US Marshal, Probation and US Atty.				
9-12-77	Notice of motion ret. 10-6-77 for an order granting a new trial filed.				
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12-9-77	Acknowledgment filed received from the c of a for receipt of supplemental index to record on appeal.				
12-28-77	Authorization for payment of expert services filed. (Ray Stalker, Court Reporter) mg				
12-29-77	Stenographer's transcript dated 7-21-77 filed. sk				
1-5-78	Scheduling order filed that the court reporters extension to file copy of transcript of Dec. 15, 1977 is amended as follows: Counsel for deft James Pascarella to submit a completed voucher on or before March 8, 1978: argument of the appeal to be heard during the week of 3-13-78 U.S. to file its brief on or before 2-27-78.etc.				
1/18/78	Acknowledgment received from court of appeals for receipt of supplemental record on appeal				
1-19-78	Voucher for expert services filed for Maurice Davis and forwarded for payment.				
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A TRUE COPY
ATTEST
DATED Feb 1 1978

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- x
UNITED STATES OF AMERICA

-against-

PETER FRANK GIATTINO and
PATSY JOHN RAUCCI,

Defendants.

INDICTMENT

Cr. No. 76 CR 714
(T.26, U.S.C. §§5861
(c), (d) and (1),
5822 and 5871; T. 18,
U.S.C., §2)

----- x
THE GRAND JURY CHARGES:

COUNT ONE

On or about the 8th day of August 1976, within the Eastern District of New York, the defendant PETER FRANK GIATTINO and the defendant PATSY JOHN RAUCCI did wilfully, knowingly and unlawfully possess destructive devices as defined by Title II of the Gun Control Act of 1968, to wit, two (2) Molotov cocktails, which destructive devices were made without complying with the provisions of Title 26, United States Code, Section 5822. (Title 26, United States Code, Sections 5861(c) and 5871; Title 18, United States Code, Section 2.)

COUNT TWO

On or about the 8th day of August 1976, within the Eastern District of New York, the defendant PETER FRANK GIATTINO and the defendant PATSY JOHN RAUCCI did wilfully, knowingly and unlawfully possess destructive devices as defined by Title II of the Gun Control Act of 1968, to wit, two (2) Molotov cocktails, which destructive devices were not registered to the defendants PETER FRANK GIATTINO and PATSY JOHN RAUCCI in the National

Firearms Registration and Transfer Record. (Title 26, United States Code, Sections 5861(d) and 5871; Title 18, United States Code, Section 2.)

COUNT THREE

On or about the 8th day of August 1976, within the Eastern District of New York, the defendant PETER FRANK GIATTINO and the defendant PATSY JOHN RAUCCI did wilfully, knowingly and unlawfully possess destructive devices as defined by Title II of the Gun Control Act of 1968, to wit, two (2) Molotov cocktails, which destructive devices were not identified by serial number as required by Title 26, United States Code, Section 5842. (Title 26, United States Code, Sections 5861(1) and 5871; Title 18, United States Code, Section 2.)

A TRUE BILL.

FOREMAN.

DAVID G. TRAGER
United States Attorney
Eastern District of New York

(Jury not present.)

THE COURT: Is there some problem?

MR. PASCARELLA: Yes, Your Honor. There is something I want to bring to Your Honor's attention. In reviewing the Grand Jury minutes of Police Officer Reiersen, who I presume will be testifying this afternoon, I received these minutes earlier in the day. I believe the government has it marked as exhibit 1 for identification, and at page 20, line 16, Mr. Reiersen in response to a question put to him by the Assistant United States Attorney, Mr. Rocco, said, "Question: How did he acknowledge to you that he understood those rights?" That is apparently after he, Reiersen, advised Mr. Giattino of his rights and his answer was, "When I asked him if he wanted to speak to me he told me he was going to take my advice and wait to talk to his lawyer."

Now, directly following that line 19, the next question, "Now, subsequent to that moment, did you have occasion to have a conversation with Mr. Giattino while you processed him?" and the answer is, "Yes."

Then on page 21, Reiersen continues on line 4, "At one point I asked Mr. Giattino why he did it. I

1
2 asked him, 'Why did you do it? You just don't like
3 the guy or someone paid you to do it?' and he said,
4 'Yes, I didn't like the guy.'"

5 Now, these statements are apparently made by
6 Mr. Giattino, according to Mr. Reiersen, after Mr.
7 Giattino--and this is the first I know of this be-
8 cause Mr. Giattino has expressed the view to me that
9 he has never said anything, but according to this,
10 police Officer Reiersen continued to question Mr.
11 Giattino about the incident, asking him direct ques-
12 tions. He continued to ask him questions after Mr.
13 Giattino advised him that he wanted--he wasn't going
14 to say anything further.

15 He wanted to speak to his lawyer or his attorney.
16 I would submit that in the precinct atmosphere there
17 may be a feeling of a coercive atmosphere. There may
18 have been some deceit or trickery to get Mr. Giattino
19 to say it. I don't believe if they--if we go by the
20 testimony of Mr. Reiersen in the Grand Jury, we can
21 say that Mr. Giattino knowledgeably waived his con-
22 stitutional rights that he did have to remain silent.
23 This changes the picture considerably from what I
24 thought had existed.

25 As I explained to the Court earlier my client

1
2 has always told me he never said anything, made any
3 statement.

4 Giving the benefit of the doubt to the govern-
5 ment and reading what Mr. Reiersen just said minutes
6 ago, reading this, I feel there is an issue here with
7 regard to the validity of the statement that Mr.
8 Giattino apparently made after advising the police
9 officer he didn't want to talk anymore.

10 THE COURT: You just got the Grand Jury testi-
11 mony today?

12 MR. PASCARELLA: That's correct.

13 THE COURT: Why do you hold up, Mr. Thompson?
14 Look at the problems you create for me?

15 MR. THOMPSON: I apologize for that. I myself
16 did not have a copy of this testimony until Friday
17 that I was able to provide.

18 MR. PASCARELLA: I just started reading it dur-
19 ing the recess.

20 THE COURT: What is your position?

21 MR. THOMPSON: Well, Your Honor, the advice
22 which occurred in the precinct was the second advice.
23 Immediately following the giving of that advice,
24 Officer Reiersen proceeded to complete--began to
25 complete the arrest report which contains some

1
2 information which he was able to fill in from his own
3 knowledge and other information with regard to Mr.
4 Giattino's personal identity which he abstracted from
5 the driver's license and motor vehicle registration
6 certificate and other pedigree type information, such
7 as the wife's name and maiden name and so forth, which
8 the defendant responded to, which questions he an-
9 swered. It was interspersed with and in the process
10 of completing this arrest report, the pedigree sheet
11 that this arose. It was at that point where the
12 property on Mr. Giattino's person was being examined
13 by Officer Reierson and he was examining a quantity
14 of United States currency. After looking at it and
15 counting it he asked him the question, as Mr.
16 Pascarella indicated and the defendant answered.
17 There had been no change in status or background or
18 inter- action in terms of the interview per se. If
19 that is what it is to be called, it was all part and
20 parcel of the same sitdown at the desk. There is no
21 question that Mr. Giattino was in custody.

22 He was then handcuffed to the desk itself and
23 that Officer Reierson was in the precinct, that's not
24 an issue--

25 MR. PASCARELLA: Your Honor, if I may say

1 something further? If what Mr. Thompson says is
2 true, my position is stronger because if it was during
3 the course of the pedigree and the standard type of
4 information, then Mr. Reiersen elicited this response,
5 if we are to give credence to his testimony in the
6 Grand Jury, surely there must have been an element of
7 deceit in it.
8

9 Secondly, the incident with regard to the inter-
10 viewing the currency occurs later, and there was a
11 response to this statement. If we follow the testi-
12 mony of Reiersen I would submit that these statements,
13 if they are true, were elicited improperly and should
14 not be admissible in this trial.

15 THE COURT: It is the craziest situation I have
16 ever heard of. You take the position they were never
17 made, but having gotten the information you're play-
18 ing the game on the government's terms and the govern-
19 ment gives you the information that says even on
20 their terms they probably aren't admissible. So, now,
21 we have to have a suppression hearing on whether or
22 not these statements are admissible, because the
23 government didn't go through with some pre-trial dis-
24 closure.

25 If it had been done a month ago we could have had

1
2 this cleared up. You say you only got them on Friday.
3 why didn't you have them four weeks ago?

4 MR. THOMPSON: I was making efforts.

5 MR. PASCARELLA: If I might say, while I only got
6 the Grand Jury minutes a little while ago and I read it
7 during the recess, Mr. Thompson has been very cooper-
8 ative with regard to providing discovery and whether--
9 I don't think that changes the situation with regard
10 to my client and these statements, I do want to say
11 that.

12 THE COURT: But the net effect of whatever has
13 been done by counsel here, we have a case that really
14 isn't ready to go to trial, even though we started it.
15 We have a suppression hearing to do. Why don't we
16 do all the suppression hearings this afternoon? I'll
17 send the jury home and we'll continue with the hear-
18 ings. I hate to do it, because I don't like to in-
19 convenience 14 publicly spirited citizens. But, I
20 don't see that it gives me any choice.

21 I have no idea what kind of explanation or what
22 is going to come up here for the interjection of
23 substantive questions along with the routine pedigree
24 data which I gather there is nothing anybody would
25 want to exclude anyway--

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2 MR. THOMPSON: Your Honor, there is another oc-
3 casion continuing right after the portion to the point
4 which Mr. Pascarella read. The next question was,
5 "Did Mr. Giattino say anything else?"

6 "ANSWER: At one point during the questioning
7 for pedigree I asked if there are any amputations
8 and deformities. When I asked him that I said, 'Do
9 you have all your fingers and toes?' 'Yes, I left
10 my head home this morning.' some words similar to
11 that. I felt he was conveying he wasn't using his
12 head this morning."

13 There's a general type of conversation, the police
14 officer himself at the time was not having obtained it
15 in a formal interview per se nor a written document.
16 Apparently he did not consider these to be statements
17 other than for the purpose that he was processing the
18 defendant.

19 MR. PASCARELLA: Your Honor, I have no doubt
20 that he did ask him pedigree questions and that is the
21 crux of the issue. He was told the defendant didn't
22 want to answer any more questions. Once advised of
23 this he asked him pedigree questions which the law
24 permits and when he asked these questions he asked
25 the other questions.

1
2 I might also elude to that statement by Mr.
3 Thompson, I believe it is a statement that has just
4 come to light to me when I read this. I didn't know
5 about that statement before. I knew of other state-
6 ments, but not this partilar one about leaving my
7 head home. Taken out of context it's not the most
8 devastating, but it's something that could work some
9 prejudice. I feel I should have known about that one
10 too.

11 My position is that all the statements made at
12 the precinct after the defendant said he didn't want
13 to talk and he wanted his counsel, are statements, if
14 they were obtained, they were obtained improperly.

15 THE COURT: Well, do you gentlemen see any other
16 way to resolve this question without having a suppres-
17 sion hearing?

18 MR. THOMPSON: No, Your Honor.

19 THE COURT: All right. Bring in the jury. I'll
20 send them home and we'll proceed and take care of our
21 hearings this afternoon.

22 MR. PASCARELLA: Your Honor, may we have five
23 minutes before we start the hearing after the jury is
24 excused?

25 THE COURT: Yes.

(Whereupon, the Court resumed.)

THE COURT: First, the question has been raised with respect to the credibility of the witnesses, particularly Officer Reiersen. For the record I find his testimony to be credible as given. The confusion with respect to whether Mr. Raucci or Mr. Giattino had made the statements seems to be a confusion in paper work. There was no confusion in the witness' testimony itself.

Overall Officer Reiersen was candid, straightforward. I find his testimony to be credible as I do that of Officer Alfredson.

With respect to the search question. I think there is no doubt, as Mr. Thompson's argument indicated there was probable cause for a search, but as Mr. Pascarella pointed out, to have a valid search there must be probable cause plus something else. Either a warrant which was not obtained here or a search merely incident to the arrest and under the circumstances here, I find the search was not incident to the arrest. Whatever search was made at that time was concluded, the car was locked and left alone for some period of time. Alternatively there must be some exeget circumstances which would have justified

1
2 the failure to obtain a search warrant or find there
3 were no such exeget circumstances here. The warrant
4 could have been obtained. The car was left on the
5 side of the road, locked, no evidence that there was
6 any threat of its being removed. The prior occu-
7 pants of the car were in custody, even though the
8 uniformed police officer in the Suffolk County Police
9 Department did not obtain the warrant himself, that
10 doesn't mean the warrant is not available upon reason-
11 ably short time if it is sought.

12 In this case there was no attempt to seek it and
13 I find that the search violated the defendants'
14 rights; therefore, the motion to suppress the evidence
15 as a result of that search is granted.

16 With respect to the statements, it appears that
17 the defendant Giattino was advised of his Maranda
18 rights, once at the car and again at the station.
19 I accept Officer Reiersen's testimony that when he
20 gave Mr. Giattino his rights the second time at the
21 Precinct house he followed up with, "Do you want an
22 attorney?" to which Mr. Giattino answered, "Yes."

23 Officer Reiersen asked him, "Would you like to
24 speak now without your attorney?" to which he res-
25 ponded, "No, I'll take your advice and wait for an

1
2 attorney."

3 Under the Maranda decision that should be inter-
4 preted as cutting off the officer's right to question
5 the defendant about the offense and that right to cut
6 off the questioning is one which Maranda says must
7 be scrupulously observed. That does not mean that
8 there be suppressed statements which are un-
9 solicited and not prompted by questioning or sugges-
10 tions from the officer. In the context of what hap-
11 pened here, apparently Detective Miller was present
12 at least during a portion of the events which trans-
13 pired while the defendant was handcuffed to the desk.
14 In response to questioning by Detective Miller, the
15 defendant apparently also indicated his desire not
16 to answer questions. There are four specific state-
17 ments which are in question. They call for differing
18 results as I see it in terms for the motion to sup-
19 press.

20 The question which Officer Reiersen asked going
21 through the pedigree information, and there is no
22 issue over the right of the officer to elicit the
23 pedigree type data, the particular question and an-
24 swer, whether there had been any amputations or
25 were there any deformities and he interpreted that

1
2 question as, "Do you have all your fingers and toes?"
3 and the answer, "Everything except my head," I inter-
4 pret to be purely a voluntary statement, unsolicited
5 by the officer and with respect to it I am denying
6 the motion to suppress.

7 Whether or not the jury interprets the question
8 in the same manner that the officer did, that is
9 that the defendant was saying he had done something
10 foolish, we'll leave that for the jury to determine.

11 With respect to what is probably the most diffi-
12 cult question, that is during the course of the inter-
13 view by Officer Reiersen, one of the officers in the
14 vicinity asked, "Why didn't you shoot him?" to which
15 Officer Reiersen responded, not to the questioning
16 officer but to the defendant. Apparently by way of
17 explanation that Reiersen could have shot him had he
18 found him with a molotov cocktail in his hand. That
19 is if he arrived a few minutes earlier and he went
20 on and explained that if he had arrived a few minutes
21 later we would not be dealing with an attempted arson,
22 but actual arson because the building would have ac-
23 burned.

24 In the form as testified to by Officer Reiersen,
25 this is not a question. It did not in form at least

1
2 call for a response. Nevertheless the witness did
3 respond, "No, I would have surrendered," I was not
4 in that kind of jeopardy of being shot. Well, the
5 question is close in my mind as to whether this is a
6 volunteered statement or one which was prompted by
7 questioning and I am inclined to feel that since the
8 defendant's right to cut off questioning is one which
9 should be scrupulously observed, it would seem to
10 extend to the point of prohibiting discussions con-
11 cerning the events in question. Whether or not a
12 probe by the interrogating officer is put in the form
13 of a question or a form of a statement, perhaps a
14 statement designed to create an emotional response
15 as telling him that he might have been shot, I think
16 this goes beyond the area of proper. I'll say not
17 interrogation, but of conversation between the officer
18 and the defendant and therefore I will grant the
19 motion as to that statement.

20 The other two statements that are involved are
21 somewhat easier. With respect to the large number of
22 bills asking the defendant, "Was it worth it," and the
23 answer with an ambiguous shrug, shaking of the head,
24 which may have meant, "No," in view of Officer
25 Reiersen's testimony, it may have meant something

1
2 else. Even he wasn't sure what it meant. Whatever
3 it may have been, it was a directed question aimed at
4 the transaction and in view of the defendant's twice
5 expressed desire to remain silent, I think it should
6 be suppressed.

7 With respect to the question, "Why did you do
8 it, didn't you like him or did someone pay you to do
9 it," and the response, "Yeah, I didn't like them,"
10 that too is improper interrogation under the circum-
11 stances and I am granting the motion as to that state-
12 ment.

13 I don't mean to imply that I find anything of an
14 involuntary nature in the way of the statement. I
15 think the overall context of the questioning is one
16 of more or less casual conversation, if indeed there
17 can ever be a casual conversation between a police
18 officer and someone he has arrested for a serious
19 crime. But, there is nothing in the circumstances
20 which I find to constitute an overbearing of his will.
21 The defendant was well treated. The period of time
22 that elapsed was not inordinate. There is no abuse
23 that is made known to me through the testimony.

24 The basis for my decision in excluding the
25 second and third and fourth statements or answers

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2 given by the defendant is based entirely upon the
3 recognition and requirement in Maranda and cases
4 interpreting it, that once a defendant states that he
5 wants to remain silent or does not want to say any-
6 thing until after he has consulted an attorney, it
7 becomes incumbent upon the law enforcement officers
8 to scrupulously honor that request.

9 Since it was not honored with respect to two or
10 three of the statements, I am granting the motion as
11 indicated.

12 With respect to the statement No. 1, which merely
13 seems to have been a volunteered statement in the
14 context of the pedigree interview, and something that
15 could hardly have been anticipated or in any way
16 avoided by the officer, I am denying the motion with
17 respect to that.

18 That constitutes my decision on the suppression
19 motion, gentlemen. We will be ready to proceed
20 tomorrow morning at 10:00 o'clock?

21 MR. THOMPSON: Yes, Your Honor. May I ask,
22 please, for a clarification for my own mind?

23 THE COURT: Yes?

24 MR. THOMPSON: That in the event either of the
25 defendants or in particular Mr. Giattino were to take

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2 as a destructive device shall be identified in such
3 manner as the secretary may prescribe.

4 MR. PASCARELLA: What does that mean?

5 THE COURT: I feel as if we're counting angels
6 on a pinhead. I'm not sure it's worth all the
7 trouble.

8 MR. THOMPSON: I can't take issue beyond the
9 face of the documents themselves. At this point I
10 don't intend to.

11 MR. PASCARELLA: I do feel that a real prejudice
12 would be worked with more counts going to the jury
13 than should go to the jury.

14 THE COURT: All right. We're not to the jury
15 yet. I'll reserve decision on your motions with
16 respect to Count 1.

17 In all other respects your motions are denied.

18 MR. PASCARELLA: With regard to the possession
19 not being established in general, that goes to the
20 prima facie case.

21 THE COURT: I think there is sufficient evidence
22 for the case to go to the jury. There is more than
23 what you outlined of course in your argument. There is
24 the circumstances of a Sunday morning, no evidence of
25 anyone else in the vicinity, flight, shortly following

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2 the appearance of a fireball on top of a roof, which
3 the jury could find was caused by the molotov cock-
4 tail and had to be thrown from a short distance
5 away. Only a very short time before the fireball
6 appeared, the jury certainly could find that the
7 defendants were at the scene at that time the molotov
8 cocktails were thrown.

9 They could also find in Count 1 a conclusion,
10 they could reasonably draw from those inferences that
11 one or the other of the defendants threw them. If
12 they threw them they had possession of them and under
13 the charges in Section 2, there is ample evidence
14 here to warrant the jury to assume they were operat-
15 ing together and not independently.

16 MR. PASCARELLA: If I may be heard on Your
17 Honor's comments? I believe Mr. Reiersen testified
18 that he saw a car in the vicinity of Locust Avenue and
19 the other police officers passing said there was no
20 other cars. There may have been some other on the
21 roads indicating he saw a dark automobile somewhat
22 west of the Doll House when he was going to the call
23 box. No link was made between that automobile and the
24 other automobile of the defendant.

25 So, there were other people in the area, there

1.
2 was some traffic. I think they have indicated that.

3 THE COURT: The jury could reasonably infer that
4 dark automobile that Officer Rhoads saw was the
5 defendants' automobile.

6 MR. PASCARELLA: That's a possible inference.
7 Anything is possible. But, there is also an inference
8 there could be someone in the area, someone else.
9 I'm sure the person on Locust Street and Sunrise
10 Highway wasn't the dark automobile--which might be
11 the same as the defendants', which Mr. Reiersen
12 testified to. One of the other police officers also
13 testified the traffic was very light, meaning there
14 was--

15 THE COURT: These are arguments to be made to
16 the jury. I think there is enough, there wasn't any-
17 one else leaving the scene at 90 miles an hour. At
18 least if there was, nobody saw them. I think there is
19 also a permissible inference, had there been, they
20 would have been seen by all the cops all over the
21 place. They had seven cop cars within a mile.

22 MR. PASCARELLA: However, there are other
23 choices. You also have Officer Reiersen not seeing
24 the approach of Alfredson and Officer Rhoads is
25 facing in the other direction too. The cops didn't

1
2 see anything until there was a flash, Your Honor.

3 THE COURT: Again, that is jury argument from
4 the flash on. Things get hot so to speak. I think
5 the jury has sufficient evidence on which to base a
6 finding of guilty on one or more of these counts,
7 giving all favorable inferences to the government as
8 I must at this stage of the case.

9 That leaves us with the defense to go forward
10 tomorrow. Can you give me some idea or guidance as
11 to what we're talking about in terms of time?

12 MR. PASCARELLA: Your Honor, might I also remind
13 the Court that some of that might depend on what is
14 happening with me personally?

15 THE COURT: I understand your personal problems.

16 MR. PASCARELLA: I believe that.

17 THE COURT: I still have to worry about this
18 case.

19 MR. PASCARELLA: I believe that tomorrow, if we
20 begin the defense, it should complete its case by the
21 end of the day. That will depend on Mr. Thompson.

22 THE COURT: We're getting back on schedule then.
23 With the summations and charge Friday morning.

24 MR. PASCARELLA: It would appear that way.

25 THE COURT: Would you anticipate any extensive

(Jury present.)

THE COURT: Any rebuttal testimony?

MR. THOMPSON: Yes, Your Honor. At this time the government calls Carol Fein.

MR. PASCARELLA: Your Honor, may we approach the side bar before any witness is called?

(The following occurred at side bar.)

MR. PASCARELLA: I know what is coming because I spoke with Mr. Thompson. Apparently this is a witness who will say she saw Mr. Raucci at the Doll House one time or whatever. Some time ago during discovery I had a discussion with Mr. Thompson and I asked him that and he indicated to me that Mr. Giattino was seen there and a bouncer and bar maid had thought maybe they recognized Mr. Giattino. But no one had ever seen Mr. Raucci there from the pictures they showed them. Subsequently he told me that the ^{identification} balance wouldn't be positive, that is when Mr. Jensen was there at the Doll House and someone looked at Giattino and the ^{like} bouncer said it was Mr. Giattino again. But at this particular point I suspect Mr. Thompson is trying to say that this witness will identify Mr. Raucci and it looks like somebody she saw. I think it's improper based on what has been told to me in discovery of this case. I don't think it is a very significant rebuttal

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1 to risk the prejudice. As an officer of the Court I
2 reviewed
3 recognize the conversations through my notes and that
4 refreshes my recollection of what has gone before.

5 THE COURT: Let me excuse the jury.

6 (The following occurred in open court.)

7 THE COURT: Ladies and gentlemen, I'll ask you to
8 step into the jury room for a few minutes. Do not
9 discuss the case.

10 (Jury excused.)

11 THE COURT: Continue, Mr. Pascarella?

12 MR. PASCARELLA: That's the basis of my objec-
13 tion. This is something that I was not apprised of
14 before. I was told the exact opposite with regard to
15 Mr. Raucci. They told me it was Mr. Giattino.

16 In fact I was upset upon hearing that Mr. Giattino
17 was seen in the Doll House and supposedly had a repu-
18 tation for getting drunk. I asked Mr. Giattino about
19 it. He said no, he had been to the Doll House but
20 he hadn't been there for quite some time, in over a
21 year. [I spoke further with Mr. Thompson on the sub-
22 ject and it turned out that Mr. Giattino possibly
23 wasn't the fellow.]

24 Mr. Jensen was at the Doll House and supposedly
25 someone recognized the photo of Mr. Giattino and at
that very same time someone else said it appeared or

1 looked like Mr. Giattino. The bouncer thought he was,
2 he couldn't be sure.

3 Certainly with regard to Mr. Raucci, I checked
4 very explicitly with Mr. Thompson. He never told me
5 that Mr. Raucci was there and Mr. Raucci told me he
6 wasn't there.

7 I would have at that point checked into it fur-
8 ther. Mr. Thompson told me he had spoken to Mr.
9 Esgro and the employees hadn't seen him there either.

10 THE COURT: Mr. Thompson?

11 MR. THOMPSON: Your Honor, with regard to that,
12 Mr. Pascarella did ask me and in fact I informed Mr.
13 Pascarella that the information communicated to me
14 from Agent Jensen as a result of his investigative
15 activities in fact indicated that both defendants
16 frequented and/or recognized by employees of numerous
17 topless dancing establishments. In particular I
18 identified to Mr. Pascarella the bouncer at the Doll
19 House as one who had indicated he could recognize Mr.
20 Giattino, the nature or the transitory nature.
21 Frankly, Your Honor, with all of the employees as well
22 as the entertainers at these establishments it made
23 this an investigation of considerable length.

24 [However, I have continuously informed Mr.
25 Pascarella my impressions of both these defendants

1 *What about*
2 *Doll House*
3 *specifically?*
4 *Spoke w/*
5 *11/10/77*
6 *- should have*
7 *told me.*
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in terms of whether they do or do not frequent es-
tablissements such as the Doll House and it was that in
fact they did. I was continuing in efforts to locate
people, either patrons or employees or owners who
would be able to identify either of these defendants
and connect them with the Doll House establishment.

7 *What in*
8 *investigation*
9 *is this about?*
10 *Should*
11 *have been able*
12 *to tell*
13 *Pascarella*
14 *11/10/77*
15 *again*
16 *day*
17 *- 2 not*
18 *before?*
19
20
21
22
23
24
25

That investigation has continued to this day.
Your Honor.]

9 THE COURT: How about the testimony you are
10 about to propose?

11 MR. THOMPSON: This witness will testify that she
12 was employed at the Doll House during the months of
13 July, 1976, through approximately the middle of
14 August, 1976, and that in that time she saw Mr. Raucchi
15 present as a patron at the Doll House.

16 MR. PASCARELLA: Your Honor, this is very pre-
17 judicial and even if it's as Mr. Thompson says, I'd
18 like to believe that he's mistaken in his recollection,
19 I haven't been advised of this prior to this and
20 putting him as a patron around the ^{Time} vicinity of this
21 incident is very prejudicial. Mr. Raucchi has assured
22 me he has never been there and I had my recollection
23 that Mr. Thompson told me that Mr. Raucchi was not.
24 In fact he told me Mr. Raucchi hadn't been ^{to} nor fre-
25 quented the Doll House. It was Mr. Giattino who was

1 known to frequent the Doll House and had been at the
2 Doll House. That is my distinct recollection. I
3 discussed it with Mr. Raucci and I discussed it with
4 Mr. Giattino and I discussed it with Mrs. Raucci. I
5 discussed it with friends of theirs. I'm sure that it
6 can be demonstrated that was my impression at the
7 time. But, putting that aside, whether or not he
8 frequented other places isn't important. If the
9 investigation was continuing I'm sure Miss Fein didn't
10 just appear, the government has to know and should
11 have advised me. If we go any further than that
12 point I think the testimony should be excluded.

13 MR. THOMPSON: I disagree as to the government's
14 obligation to disclose the testimony of its witnesses
15 prior to their taking the stand.

16 MR. PASCARELLA: I asked with regard to the iden-
17 tity in my discovery. We went through all the wit-
18 nesses, who they could or could not identify, including
19 the bouncer and the name Carol Fein rings a bell with
20 me. But, I was not told that she could recognize Mr.
21 Raucci or anybody else could. Especially during the
22 months of July and August, 1976, it is a very crucial
23 time.

24 THE COURT: Why did you request charges with re-
25 spect to identification?

MR. PASCARELLA: With respect to identification?

THE COURT: Yes.

MR. PASCARELLA: Your Honor, the particular charges that we're talking about, I don't have them. Do you have the particular charge that you are referring to, Your Honor?

THE COURT: Five and six.

MR. PASCARELLA: Your Honor, at this particular point these are charges that were submitted and were ready prior to the start of the case. They were typed before then. These are general identification charges that I use most of the time and that aren't exactly boiler plate identification charges. Not all the charges might be directly applicable to the case. There also could have been at the time a question of identity of individuals in the car at the Doll House, etc. At that time also Mr. Giattino was a distinct possibility to testify. But I do say to the Court as an officer of this Court, this is my best recollection of what happened and what occurred. I did check into that fairly thoroughly as a number of witnesses can easily bear out with regard to these activities of Mr. Raucci.

THE COURT: I'm getting a flood of words from the both of you. You say I shouldn't let her testify

1 for some reason having to do with discovery. Just
2 give it to me in as few words as possible why the
3 government should be precluded from putting a witness
4 on to contradict the defendant Raucci who said he had
5 never been to the Doll House before he was taken there
6 by the police?

7 MR. PASCARELLA: For one reason it's misleading.
8 Because, I asked for that specifically and I was told
9 that he had not been recognized there.

10 I came to rely on it and Mr. Raucci told me what
11 his story was.

12 THE COURT: Who did you ask?

13 MR. PASCARELLA: I asked Mr. Thompson and I
14 think it was in January that we were discussing it in
15 his office, in the Westbury office I think.

16 THE COURT: What did he tell you?

17 MR. PASCARELLA: If I may refer to my notes of
18 that meeting, Your Honor?

19 THE COURT: Go ahead?

20 MR. PASCARELLA: All right. With regard--with
21 regard to the appearances at the Doll House. I have
22 here, and this ^{refreshes} ~~reverses~~ my recollection of what oc-
23 curred. Again, these are just notes and I didn't put
24 everything down, but I have Mr. Thompson and Jensen
25 saying, ^{Giothino} "Doll House customer was in the bar a few days

10
1 before incident. Then better going into detail it
2 was indicated that Mr. Giattino gets drunk at these
3 places, that he frequents these places.

4 Now, after that, I discussed this matter further
5 with Mr. Giattino and Mr. Raucci and Mrs. Raucci. I
6 went back and I spoke to Mr. Thompson about it and
7 Agent Jensen and I indicated I was at first--I thought
8 because they said it it might be true and there was a
9 denial with regard to Mr. Giattino. Then it was ex-
10 plained to me this incident involving Mr. Jensen and
11 the bouncer whose name I have in my notes somewhere.
12 Then he said the bouncer couldn't make a positive
13 identification. This certainly misled me, if to say
14 nothing else. If this had been something that was
15 discovered subsequent I think they had a duty to con-
16 tinually disclose it since I asked for it and in not
17 disclosing it they misled me to believe this wasn't
18 the case.

19 THE COURT: The continuing duty to disclose under
20 Rule 16(c) seems to apply to material which is subject
21 to discovery or inspection under Rule 16--

22 MR. PASCARELLA: Your Honor, what is subject to
23 and even if we get beyond that point in not determining
24 whether it is subject to, we had discovery in good
25 faith. I made no formal motions. Mr. Thompson has

11
1 been very helpful with regard to the every ma-
2 terial. I took at full value everything he told me and
3 I relied on the statements about Mr. Raucci.

4 THE COURT: How have you been prejudiced?

5 MR. PASCARELLA: Your Honor, now it's sought to
6 be used in rebuttal after Mr. Raucci testified that he
7 was never at the Doll House. Someone is going to say
8 she saw him in the Doll House during the months of
9 July and August and I would say based especially upon
10 a tentative identification of Mr. Giattino and the
11 change in heart, how valid is the identification? Is
12 it worth that type of thing now at this stage of the
13 case and I was certainly misled. There would have been
14 a number of considerations whether or not that area
15 would have been testified to. Whether or not Mr.
16 ^{Raucci} Giattino would have taken the stand. At this point
17 he has now taken the stand and testified and the
18 government tells me--

19 THE COURT: You mean Mr. Raucci?

20 MR. PASCARELLA: Mr. Raucci, for some reason I
21 keep confusing Mr. Raucci and Giattino by name.

22 THE COURT: Mr. Thompson, when did you learn of
23 this testimony by Miss Fein?

24 MR. THOMPSON: Your Honor, it was earlier this
25 year, at or about the end of February, between the end

1 of February and the middle of April. Your Honor. *been testified ID*

2 THE COURT: Why didn't you tell Mr. Pascarella?

3 MR. THOMPSON: Well, I'll tell you, Your Honor,
4 on the 4th of January Mr. Pascarella and Mr. Jensen
5 and I did meet and with regard to that paragraph 3
6 where he requested in his discovery letter the nature
7 and method of identification of the defendants as the
8 person who committed the crimes alleged, I related in
9 substance the nature of their being observed at the
10 scene and apprehended after a brief chase during which
11 contact was constantly kept.

12 In terms of their identity, in terms of the mat-
13 ter of Mr. Pascarella's request for a list of wit-
14 nesses' testimony the government would use at trial as
15 set forth in paragraph 6 of his letter, we literally
16 went through a list considerably longer than a number
17 of police officers who ultimately testified, and in
18 addition I apprised Mr. Pascarella that Mr. Esagro was
19 present at the precinct and that I was not aware if he
20 would or would not be a witness. That Miss Lynn
21 Navotney was present at the precinct and was the bar
22 maid of that evening. We had Patricia Arronson and
23 Edward Perrock who was the local manager for AP Talent
24 Agencies located on the second floor of the business.

25 At that point I had no information that any of

1 those people were able to identify either of the de-
 2 fendants in terms of their having been at the premises
 3 that day. That I informed Mr. Pascarella that Agent
 4 Jensen was continuing in his efforts with regard to
 5 an attempt to locate people who could place these
 6 defendants in and about establishments of this type
 7 and this establishment in particular. That I was get-
 8 ting reports that indicated that they did in fact
 9 frequent these establishments.
 10 I communicated this to Mr. Pascarella. He
 11 frankly responded with a demonstration of surprise of
 12 hearing this news. After a period of time I got back
 13 to him and my response was, "I've got information they
 14 are at these places."

15 MR. PASCARELLA: Your Honor, I'm looking at my
 16 notes of January 5th. That is the next day which
 17 further clarifies the issue in my own mind. I was
 18 only told with regard to the activity of Mr. Giattino.
 19 Mr. Raucci was not included. On the 5th I spoke fur-
 20 ther and I have the name of the bouncer here. Jim
 21 Gamel (phonetic) where it was first thought a photo
 22 I.D. of Mr. Giattino and he knows Mr. Giattino as hav-
 23 ing been a customer and I have a notation, "Bouncer
 24 and girl not able to identify Raucci." Gamel said,
 25 "Giattino looks familiar as a guy who has come to the

1 bar."

2 These are from my notes that I'd taken of the
3 conversations and my distinct recollection is and I
4 remember telling Mr. Raucci and in fact Mrs. Raucci,
5 you know, well, what's with your uncle? Because it
6 was Mr. Giattino I was concerned with. Not Mr. Raucci
7 at all with having been there.

8 I don't know how significant it is for the
9 prosecutor's case, from his point of view, if it's
10 included or not. I think the defense's point of view
11 is it's a significant factor.

12 THE COURT: I think it goes directly to the
13 credibility of Mr. Raucci.

14 MR. THOMPSON: That's the basis upon which I
15 would seek to offer it.

16 THE COURT: Obviously.

17 MR. PASCARELLA: I know there is a basis for it.
18 That's the basis I would seek to offer^T in rebuttal.
19 But, I'm saying it's improper not only am I surprised
20 about it, but it is something new. I was misled. It
21 is no reflection on Mr. Thompson, if his recollection
22 is different than mine, it's possible it is a matter
23 of memory. I have my notes and I know who I spoke with.

24 THE COURT: You're not claiming he deliberately
25 misled you?

1 MR. PASCARELLA: I know Mr. Thompson and I don't
2 think he would do that. But what I'm saying is I was
3 misled.

4 THE COURT: The only basis on which I would ex-
5 clude her testimony would be if there had been some
6 misconduct on the part of the prosecution. I don't
7 find any here, just as you have assumed, Mr. Pascarella,
8 you do not assume that he acted deliberately. I ac-
9 cept his statement that he did not know of this wit-
10 ness until February, late February or early March.

11 I do not find that he had a duty to inform you of her
12 existence. Therefore, I find that there is no mis-
13 conduct, either intentionally or constructively under
14 the circumstances. Your position that you relied on
15 this, on what he told you and you assumed that it was
16 the full extent of his investigation up to the time of
17 the trial, to the extent that you are prejudiced by
18 the reliance, it seems to imply that you're entitled
19 to know everything the government knows about your
20 case, which is not yet the law.

21 MR. PASCARELLA: No.

22 THE COURT: And secondly, it would almost seem
23 to imply that there is some kind of ability to cast
24 a defendant's testimony in the light of what you
25 anticipate the government's case is going to be

*Later, we
saw it
was
January 10.
- 5 days after I
last applied
him.*

10
1 instead of objective facts under the circumstances.

2 MR. PASCARELLA: Your Honor, if I may indicate
3 and respond to that? If I had known about this I
4 could have done an investigation on my own. It would
5 have in no way changed Mr. Raucci's testimony that he
6 was there knowing there was going to be--knowing there
7 was going to be a witness. I hope that is not what
8 the Court is implying in the last statement. I would
9 have done further investigation had I been advised.

10 THE COURT: It may be. But Mr. Raucci knows
11 whether he was there.

12 MR. PASCARELLA: He said he wasn't to me.

13 THE COURT: That's not something he could pos-
14 sibly be mistaken about. It is not something that
15 requires an investigation. Either he was or he wasn't.

16 MR. PASCARELLA: It does require an investiga-
17 tion.

18 THE COURT: Why?

19 MR. PASCARELLA: Because if I knew about this
20 and Carol Fein, who I believe that's the name of the
21 witness Mr. Thompson called saying he was there and
22 Mr. Raucci saying he wasn't, perhaps I would have done
23 a thorough investigation and found out a little bit
24 about Carol Fein, to find out some further information
25 which could show that Mr. Raucci hadn't gone to this

1 particular place.

2 THE COURT: Let's hear her testimony and if you
3 feel you need time to do that I'll consider it.

4 MR. PASCARELLA: Can we hear her testimony first
5 in substance?

6 THE COURT: He's already given it.

7 MR. THOMPSON: I don't expect any further testi-
8 mony--

9 THE COURT: Just what he described.

10 MR. PASCARELLA: Well?

11 MR. THOMPSON: Of course, Your Honor, to indi-
12 cate the number of times she believed she saw him and
13 why she believes she--

14 MR. PASCARELLA: This is someone she believes
15 she saw?

16 THE COURT: I don't know what she's going to say.
17 The weaker she makes it the better off you are. Bring
18 in the jury and let's get on with it.

19 (Jury enters box.)

20 (End of excerpt.)

1 (Jury not present.)

2 MR. PASCARELLA: Your Honor, I have a motion to
3 make at this time before I make my usual motions
4 which would be expected at this time. That is that
5 the testimony of Carol Fein be stricken.

6 THE COURT: Denied.

7 MR. PASCARELLA: Might I just say in furtherance
8 of that, the photo shown to Miss Fein, as Your Honor
9 has seen, even if we were to take the best estimate of
10 Mr. Jensen that there were six of them, that means
11 two of the six were of Mr. Raucci, a mug shot and a
12 full standing shot. I would think that if anything
13 is impermissibly suggestive as Chief Judge Friendly
14 stated in the Fernandez case, it is certainly this.
15 If even we say there is a photo spread, three of them
16 were photographs of the defendants, one of Mr.
17 Giattino. I think it's improperly and impermissibly
18 suggestive; so much so that it implanted in her mind
19 Mr. Raucci and may have attributed to her in Court
20 identification, notwithstanding the testimony of Mr.
21 Johnson and Mr. Jensen himself with regard to him
22 being with her when Mr. Raucci was in the hall and Mr.
23 Jensen nodding his head and Johnson sees him pointing.
24 I think her testimony should be stricken, because
25 there were suggestions made by the photo and perhaps

1 other ways that make her identification improper.

2 MR. THOMPSON: Judge, if I may respond?

3 THE COURT: Go ahead?

4 MR. THOMPSON: This was not a process of identi-
5 ifying suspects. This was an investigative effort
6 into the background of known defendants. The other
7 pictures which the agent had in his package were
8 other individuals, who at that point had some possible
9 connection in that they are--in some fashion or an-
10 other associated with competing topless bars or com-
11 peting topless talent agencies. Those were the sus-
12 pects that were being sought when this photo spread
13 was assembled and to find out if anyone was present
14 at any number of bars in excess of 20, to see if any-
15 one has seen these people in these pictures. That was
16 the context in which Miss Fein was first exhibited any
17 photographs or approached with regard to her knowledge
18 of either Mr. Raucci and/or Giattino or the other
19 gentlemen in these pictures. In terms of the suggest-
20 ibility, while one witness testified he saw an agent
21 gesture with his arm in the direction of Mr. Raucci,
22 the same witness indicates--

23 MR. PASCARELLA: But at one point--

24 MR. THOMPSON: Mr. Raucci was in the company of
25 approximately 20 people based on that witness' same

*So what?
What agent
when you
are to have
a representative
spread.*

1 observations and Agent Jensen, to whom he attributed
2 this, he testified he made no such gesture and I say
3 there is no basis.

4 THE COURT: It's not for me to weigh the
5 credibility of the various witnesses. That is for the
6 jury.

7 The motion is to strike the testimony of Miss
8 Fein. Presumably on the ground that the photos that
9 were exhibited to her were impermissibly suggestive.

10 MR. THOMPSON: Excuse me, I did have one other
11 point. Agent Jensen's testimony is Miss Fein identi-
12 fied only one of the two photographs of Mr. Raucci
13 which were in a group for sure.

14 THE COURT: That goes to the credibility.

15 MR. THOMPSON: Yes, Your Honor.

16 THE COURT: It perhaps weighs onto what extent
17 they may or may not have been suggestive or the pro-
18 cedures may or may not have been suggestive.

19 Your first point in response, Mr. Thompson, goes
20 to the question as if we were arguing a motion to
21 suppress.

22 MR. THOMPSON: I'm sorry.

23 THE COURT: Well, this is the premise for Mr.
24 Pascarella's motion. That this kind of testimony should
25 not be admitted.

1 If everyone knew prior to the start of this trial
2 what they know now perhaps a motion to suppress would
3 have been made. Had it been made I don't know whether
4 I would have suppressed it or not under the circum-
5 stances.

6 Assuming for the moment that I were here, I
7 still would not have suppressed it for purposes of
8 impeachment. I would only have suppressed it for the
9 affirmative part of the government's case. This is
10 where I think you were missing the target, Mr.
11 Pascarella. Miss Fein's testimony is solely on the
12 question of credibility. I will charge the jury to
13 that effect and they should consider it only on that
14 aspect of the case and as I understand the precedents,
15 although I'm not aware of any that relate directly to
16 the question of photo spreads or anything of that
17 sort, the exclusionary rules do not apply in that con-
18 text.

19 Now, I think just for the purposes of the record
20 I ought to make some kind of findings with respect to
21 the suggestibility here. I don't think frankly that I
22 have enough information before me. I want to hear some
23 testimony from Miss Fein before I would rule on that
24 question. I don't think the procedures would be rele-
25 vant to our problem here. So, as I indicated

1 initially your motion is denied and the reason I de-
2 nied it as quickly as I did, I know what you are ar-
3 guing. I just don't think it has any application be-
4 cause of the limited nature of Miss Fein's testimony.

5 MR. PASCARELLA: I just wanted to be sure the
6 record reflects what the defense's position is.

7 THE COURT: I think everyone's positions are
8 clear now on the record.

9 MR. PASCARELLA: At this point, Your Honor, would
10 it be proper to renew my motions that were made at the--

11 THE COURT: That would be the next item. Are you
12 renewing them?

13 MR. PASCARELLA: I renew them.

14 THE COURT: Denied. I say that denied a wee bit
15 , too quickly. I reserve decision on those, on the
16 problem of duplicity and so forth.

17 (End of excerpt.)
18
19
20
21
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23
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25

1
2 THE COURT: I think the case should go to the
3 jury on the second count only. I've struggled with
4 the statutes and the regulations. At best they are
5 confusing when you get into the area of manufacturing
6 and the identification by serial number. At worst
7 they are hopeless.

8 The possession without being properly registered
9 is a relatively direct type of concept capable of
10 easy proof and explanation. I realize my function is
11 not to cop out and not submit a problem to the jury
12 simply because it's easier for me in framing a charge.
13 Frankly, my charge on one and three is prepared. But,
14 having reviewed it, I'm not sure I understand it and
15 I'm reasonably certain the jury can't understand it.

16 But more than that, in the context of the facts
17 as they have developed I have serious doubts as to
18 whether there is sufficient evidence to go to the
19 jury on the third count; even if there were, there is
20 no evidence with respect to paying taxes and the other
21 two counts or other two items that made the manu-
22 facturing improper according to the government's
23 position under count 1 were lack of registration and
24 lack of serial number.

25 If those are the only two elements that are

1
2 involved, it duplicates counts two and three. So,
3 there is duplicity with respect to count one. Going
4 back to count three, the serial number business, to
5 cover it properly in a charge as related to the facts
6 of this case, it is just so distorted as to what the
7 case is really about. I don't think that anybody
8 gets a fair trial by submitting that alone and I do
9 have some reservations with respect to whether from
10 a nice academic theoretical point of view a case has
11 been made out to prove that this was not identified
12 by a serial number. Whether it was a correct one or
13 not or something. What I'm going to do is submit the
14 case to the jury on a single count. I'll instruct
15 them for technical reasons I have dismissed the other
16 two counts. So, their job is to determine whether or
17 not there was possession of the molotov cocktails
18 which were not properly registered.

19 Now, the charge breaks down that count into five
20 elements. One is whether they possessed the molotov
21 cocktails. The second one is whether the molotov
22 cocktails were a firearm within the meaning of the
23 statute and that takes us to the term of destructive
24 device which I may have to paraphrase the statute and
25 leave it to the jury to determine whether it is a fire-

Court's Charge

1029

(Whereupon, the Court resumed)

THE COURT: Bring in the jury.

(Jury enters box.)

THE COURT: Ladies and gentlemen, we are now at the stage of the trial where you are about to undertake your final function as jurors. Your duty is a serious and important one. In performing it you actively share with me the responsibility of administering justice according to law and the evidence in this case. Your oath as jurors obliges you to discharge this final task in an attitude of complete fairness and impartiality and, as was emphasized by me when you were selected as jurors, without bias or prejudice, for or against the government or the defendants as parties to this controversy. You must not permit yourselves to be governed by sympathy or any other consideration which is not founded in evidence and in these instructions on the law.

The case is important to the government, since the enforcement of the criminal laws is of prime importance to the welfare of the community.

Obviously, it is equally important to the defendants who are charged with a serious crime and have the right to receive a fundamentally fair trial and

the community has an interest in that too.

The fact that the government is a party entitles it to no greater consideration than that accorded to any other party to a litigation.

By the same token, it is entitled to no less consideration.

All parties, the government and individuals alike, stand as equals before the bar of justice.

In these instructions I shall describe for you first the general principles applicable to all criminal trials, then the nature of the charge in this case, next the specific rules of law which are applicable to the charge, and finally something about how you should reach a verdict.

First, as to the general principles applicable to all criminal trials.

To begin with, keep in mind that I have no view whatsoever of the guilt or innocence of these defendants. Your final role in this case is to decide and pass upon the fact issues in the case.

You are the sole and exclusive judges of the facts; you determine the weight of the evidence; you appraise the credibility of the witnesses; you draw the reasonable inferences from the evidence. You

1
2 finally determine the guilt or innocence of these
3 defendants.

4 My function now is to instruct you as to the
5 law, and it is your duty to accept these instructions
6 as to the law and to apply them to the facts as you may
7 find them.

8 With respect to any fact matter, it is your
9 recollection, and yours alone that governs. Anything
10 that counsel, either for the government or the defense,
11 may have said with respect to matters in evidence,
12 whether during the trial, in a question, in argument,
13 or in summation is not to be substituted for your own
14 recollection of the evidence.

15 So, too, as to any matter in evidence, anything
16 that I may have said during the trial, or may refer to
17 during the course of these instructions, is not to be
18 taken in place of your own recollection.

19 The indictment is merely an accusation, a charge.
20 It is not evidence of the defendants' guilt.

21 Since the defendants have pleaded not guilty, the
22 government has the burden of proving the charge
23 against each of them beyond a reasonable doubt.

24 A defendant does not have to prove his innocence;
25 on the contrary, each defendant is presumed to be

innocent of the accusations contained in the indictment.

This presumption of innocence was in his favor at the start of the trial, it continues in his favor throughout the entire trial and it is in his favor now even as I instruct you and it remains in his favor during the course of your deliberations in the jury room.

The presumption of innocence is removed only if and when you are satisfied that the government has sustained its burden of proving the defendants' guilt beyond a reasonable doubt. If the government has failed to sustain its burden, then the presumption of innocence alone is sufficient to acquit him.

Now, I have used the term reasonable doubt. What is a reasonable doubt?

The words almost define themselves; that there is a doubt founded in reason and arising out of the evidence in the case, or lack of evidence.

It is a doubt which a reasonable person has after carefully weighing all the evidence.

Reasonable doubt is a doubt which appeals to your reason; to your judgment; to your common sense and experience.

1
2 It is not a caprice, whim, speculation, conjecture or suspicion; it is not an excuse to avoid the
3 performance of an unpleasant duty; it is not sympathy for a defendant.
4
5

6 If, after a fair and impartial consideration of
7 all the evidence, you can, candidly and honestly, say
8 you are not satisfied of the guilt of a defendant, that
9 you do not have an abiding conviction of his guilt;
10 in sum, if you have such a doubt as would cause you,
11 as prudent persons, to hesitate before acting in
12 matters of importance to yourselves, then you have a
13 reasonable doubt, and in that circumstance it is your
14 duty to acquit.

15 On the other hand, if after such an impartial
16 and fair consideration of all the evidence, you can,
17 candidly and honestly, say you do have an abiding
18 conviction of a defendant's guilt, such a conviction
19 as you would be willing to act upon, in important and
20 weighty matters in the personal affairs of your own
21 life, then you have no reasonable doubt, and under
22 such circumstances, it is your duty to convict.

23 Reasonable doubt does not mean a positive certainty,
24 or beyond all possible doubt. If that were the
25 rule, few persons, however guilty they might be, would

1
2 be convicted.

3 Since it is practically impossible for a person
4 to be absolutely and completely convinced of any
5 controverted fact, the law in a criminal case is that
6 it is sufficient if the guilt of a defendant is es-
7 tablished beyond a reasonable doubt, not beyond all
8 possible doubt.

9 Nor is it the government's burden to prove each
10 and every bit of evidence to be true beyond a reason-
11 able doubt. Its burden is to prove beyond a reason-
12 able doubt each and every essential element of the
13 crime charged. A reasonable doubt may arise from
14 the failure of the government to produce evidence.

15 A defendant is not obligated to present evidence
16 in his favor. He has a right to rely on the failure
17 by the government to prove its case. He may also
18 rely on evidence brought out on cross-examination of
19 witnesses called by the government. On the other hand,
20 a defendant has the power to subpoena anyone in support
21 of his position if he so chooses, and he may exercise
22 that power, if he chooses

23 I have used the term inference; an inference is
24 a conclusion which reason and common sense lead you
25 to draw from the facts which have been established by

1
2 the evidence in the case. Always it is for the jury to
3 draw whatever inferences may be called for by the
4 evidence.

5 Evidence may be either direct or circumstantial.

6 Direct evidence is that which is given of actual
7 or personal knowlegde of the fact in question.

8 In the absence of direct evidence, however,
9 reliance is often placed upon circumstantial evidence
10 which does not tend to establish the fact in question
11 directly, but rather does so indirectly by establish-
12 ing surrounding circumstances from which the fact
13 in question can be inferred.

14 A very simple example might be with respect to
15 rain. If you go outdoors and rain is falling you see
16 it, you feel it. You could at another time testify
17 that on that occasion it was raining because you had
18 seen it. That is direct evidence.

19 On the other hand, you might be indoors, you look
20 outside, it's one of those days you really can't see
21 whether it's raining or not, it may be, it may not.
22 You see an automobile going by and his windshield
23 wipers are going. You see some people, they may be
24 running, others may be carrying umbrellas. Somebody
25 comes in and shakes water off the umbrella and you

1
2 see a lot of circumstances. You hadn't seen any rain,
3 there is no direct evidence, but the other circum-
4 stances cause you to infer the conclusion, the infer-
5 ence, that it is raining. That is just a simple
6 example of the difference between direct and circum-
7 stantial evidence.

8 As a general rule, the law makes no distinction
9 between direct and circumstantial evidence, but simply
10 requires, that, before convicting a defendant, the jury
11 be satisfied of the defendant's guilt beyond a reason-
12 able doubt from all the evidence in the case.

13 What is the evidence in the case which you may
14 consider? It consists of; sworn testimony of wit-
15 nesses regardless of who may have called them; exhibits
16 received in evidence regardless of who may have pro-
17 duced them; facts which may have been admitted or
18 stipulated.

19 What is not evidence? Statements or arguments of
20 counsel in opening, summation or made during the
21 trial; statements of the Court; evidence stricken
22 from the record; questions to which objection has been
23 sustained and you must not speculate on what the an-
24 swer might have been had I permitted the answer to be
25 given.

Court's Charge

1037

1 As you have observed from time to time in the course
2 of the trial, objections were made and rulings on
3 evidence given by me. Draw no inferences from the
4 comparative frequency of objections of one or the
5 other side or from the comparative record in having
6 objections sustained. Where an objection to a ques-
7 tion is sustained, disregard the question and draw no
8 inferences from its wording about the answer that
9 might have been given. Where an objection is over-
10 ruled, evidence then received has no special weight
11 just because it was unsuccessfully objected to.
12

13 We turn now to the charge made in the indictment
14 against the defendants. At the outset, I want to
15 re-emphasize that the indictment merely states the
16 charge and that it has no weight as evidence, none
17 at all. In addition, keep in mind that even though
18 we heard testimony about arson and attempted arson,
19 the defendants are not being tried here for those
20 crimes. The specific charge here arises out of an
21 alleged possession of two molotov cocktails which had
22 not been registered as required by federal law. It is
23 only with that crime that we are concerned.
24

25 The original indictment here contained three
counts which I summarized for you at the opening of

1
2 the case. They charged that the defendants knowingly
3 possessed molotov cocktails which were not registered
4 not identified with serial numbers, and not made in
5 accordance with the requirements of law.

6 For technical reasons I have dismissed the two
7 counts relating to the making and the serial numbers;
8 that leaves for your consideration only the charge
9 with respect to possession of molotov cocktails that
10 were not registered.

11 Now, that count reads as follows: "On or about
12 the 8th day of May, 1976, within the Eastern District
13 of New York, the defendant Peter Frank Giattino and
14 the defendant Patsy John Raucci did wilfully, knowing-
15 ly and unlawfully possess destructive devices as
16 defined by Title 2 of the Gun Control Act of 1968,
17 to wit, two molotov cocktails, which destructive de-
18 vices were not registered to the defendants Peter
19 Frank Giattino and Patsy John Raucci in the National
20 Firearms Registration and Transfer Record, all in
21 violation of Title 26, United States Code, Section
22 5861(d) and 5871, of Title 18, United States Code,
23 Section 2."

24 As I indicated the indictment charges that the
25 acts of the defendants violated two statutes. One,

1
2 Title 26 of the United States Code, two sections of
3 that and the other is Title 18, one section of that.

4 First with respect to the sections in Title 26,
5 Section 5861(d) makes it unlawful for any person to
6 possess a firearm which is not registered to him in
7 the National Firearms Registration and Transfer Re-
8 cord. Section 5871 of Title 26 makes a violation of
9 the section I just read, that is 5861(d), a punish-
10 able offense. To prove that a defendant violated
11 Section 5861(d), and therefore would be guilty here,
12 the government must prove beyond a reasonable doubt
13 five essential elements.

14 One, that the defendant possessed one or more or
15 both of the molotov cocktails. Two, that the molotov
16 cocktails so possessed were "firearms" within the
17 meaning of the statute. Three, that the defendant
18 possessed the molotov cocktails knowingly. Four, that
19 the defendant was generally aware of the destructive
20 characteristics of the molotov cocktails, and five,
21 that the molotov cocktails were not registered to
22 the defendant in the National Firearms Register and
23 Transfer Record.

24 To establish the first essential element, the
25 government must prove that the defendant in question

1
2 possessed the molotov cocktails. To prove this, the
3 government must show that the defendant had direct
4 physical control over at least one of the two molotov
5 cocktails.

6 The second element is that the molotov cocktails
7 were firearms. You probably noticed that the statute
8 uses the term firearm, whereas the indictment used
9 the word destructive devices. Thus, it is important
10 that you should know, and I so instruct you that un-
11 der another Section of Title 26, a destructive device
12 is a firearm. The question here therefore is whether
13 either of the molotov cocktails was a destructive
14 device.

15 Now, a destructive device means, among other
16 things, an incendiary bomb, an incendiary grenade, or
17 incendiary missile having an incendiary charge of more
18 than one-quarter ounce, or a similar incendiary de-
19 vice. In this regard, I instruct you that incendiary
20 means causing or capable of causing fire and that a
21 missile is an object thrown at or dropped on a tar-
22 get.

23 To put it another way, the terms firearm and
24 destructive device both include an incendiary device,
25 the function of which is to ignite and destroy

1
2 property. It must be similar to an incendiary or
3 fire bomb, or grenade, or missile, but need not be
4 identical. Any article or device composed of a com-
5 bustible material capable of producing sufficient
6 heat to destroy property of any kind, and having com-
7 ponents designed to ignite that combustible material,
8 is under the law an incendiary device similar to a
9 fire or incendiary bomb or grenade or missile.

10 The third essential element is that the defendant
11 possessed the molotov cocktails knowingly. In this
12 context knowingly has a special meaning. It means
13 voluntarily and intentionally and not because of mis-
14 take or accident or over innocent reason.

15 The fourth element is that the defendant is
16 generally aware of the destructive characteristics
17 of the molotov cocktails. Although the government
18 does not have to show that the defendant knew that
19 the molotov cocktails had been defined by United
20 States law as firearms or as destructive devices,
21 the government must establish that the defendant was
22 generally aware of the destructive characteristics
23 of the molotov cocktails.

24 The fifth essential element to the government's
25 case is that the molotov cocktails were not registered

1
2 to the defendant in the National Firearms Register
3 and Transfer Record.

4 The government has introduced into evidence
5 government's Exhibits 5 and 6, which are certificates
6 of the custodian of the National Firearms Register
7 and Transfer Record to the effect that he has made a
8 diligent search and has found no record of either
9 Exhibit 23, the Inver House bottle and its contents
10 and Exhibit 24, the neck of the Four Roses bottle,
11 being registered as a firearm to either of the
12 defendants.

13 You may accept these certificates as evidence
14 that Exhibits 23 and 24 were not registered to either
15 of the defendants in the National Firearms Register
16 and Transfer Record, but you are not compelled to do
17 so. It is up to you to determine what evidence you
18 will accept.

19 You may have noticed that I have occasionally
20 referred to the molotov cocktails in the plural,
21 since the indictment charges the defendant with
22 possession of two unregistered molotov cocktails.
23 I emphasize, however, that to convict a defendant
24 under Count Two, it is only necessary that you find
25 that as to him the government has established beyond

1
2 a reasonable doubt the five essential elements of
3 the crime with respect to one molotov cocktail.

4 Now, you will recall that I said earlier there
5 were two sections of the law that the defendants are
6 charged with violating. The first is the provision
7 of Title 26 relating to possessing an unregistered
8 destructive device which I have already discussed.
9 The other section you must consider is Section 2(a)
10 of Title 18 which pertains to persons who aid and abet
11 others in the commission of a crime.

12 Section 2(a) reads: "Whoever commits an offense
13 against the United States or aids, abets, counsels,
14 commands, induces or procures its commission, is
15 punishable as a principal."

16 Where, as in the present case, two or more per-
17 sons are charged together with the commission of an
18 offense, the government is not required to prove that
19 one of the defendants alone did all of the things
20 required to make out the offense. On the contrary,
21 under Section 2 of Title 18, all those who aid and
22 abet the commission of an offense or cause an act to
23 be done which if directly performed would be an
24 offense, are treated as equally guilty of the crime,
25 that is, they are punishable as principal offenders.

Court's Charge

1044

Hence, if a person voluntarily unites his efforts with one or more others to bring about the commission of a crime, he is equally guilty with the others and they with him, provided he is conscious of the nature of the criminal venture and intentionally associates himself in its furtherance and actively participates in bringing about the accomplishment of the criminal venture.

Keep in mind, however, that mere association is no crime. There is no such thing under our laws as guilt merely by association. The mere presence of a defendant where a crime may have occurred, even coupled with that defendant's knowledge that a crime is being committed, or the mere negative acquiescence by a defendant in the criminal conduct of others, even with guilty knowledge, is insufficient to establish guilt. An aider and abettor must have some interest in the criminal venture. In order to convict a defendant, you must be convinced beyond a reasonable doubt that he voluntarily and intentionally participated in a criminal venture in an effort to make it succeed.

With respect to each defendant, the government must prove every element of the crime charged beyond

1
2 a reasonable doubt. If the government fails as to
3 any element, you must acquit.

4 The fact that one element of the crime may or
5 may not exist has no bearing upon any other element.

6 If you conclude that one element of the crime
7 has been established, you may not infer solely from
8 the existence of that element the existence of any
9 other element of the crime.

10 If any element of the crime has not been es-
11 tablished beyond a reasonable doubt, your verdict must
12 be not guilty. On the other hand, you must convict
13 the defendant if each of the elements of the crime
14 has been proved beyond a reasonable doubt.

15 A difficult aspect of any jury's duty is to
16 determine the credibility of the witnesses and to
17 weigh their testimony. In this case it is a critical
18 problem.

19 You, the jurors, are the sole judges of the
20 credibility of the witnesses. Credibility refers to
21 the believability of their testimony and the weight
22 their testimony deserves.

23 Your determination of the issue of credibility
24 very largely must depend upon the impression that a
25 witness makes upon you as to whether or not he is

Court's Charge

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telling the truth or giving you an accurate version of what occurred.

When you come into a courtroom and sit in the jury box, while the trial is going on, when you are deliberating in the jury room you have your common sense, your good judgment and your experience with you. You decide whether or not a witness is straight-forward and truthful; whether the witness attempts to conceal anything; whether the witness has a motive to testify falsely; whether there is any reason why the witness might color his testimony.

In other words, what you try to do, to use the vernacular, is to size a person up just as you would do, in any important matter where you were undertaking to determine whether or not a person is truthful, candid and straight-forward.

Scrutinize the testimony given, and the circumstances under which each witness testifies, and every matter in evidence which tends to show whether a witness is worthy of belief.

Consider each witness' intelligence; motive and state of mind; demeanor and manner while on the witness stand.

The witness' own ability to observe the matters

Court's Charge

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as to which he testifies, whether he shall impress you as having an accurate recollection of these matters. The relation each witness might bear to either side of the case; the manner in which each witness might be affected by the verdict; the extent to which, if at all, each witness is either supported or contradicted by other evidence.

You may recall that some of the government's witnesses were cross-examined about statements they had made on other occasions such as before the Grand Jury, in a pre-trial hearing or in reports they had made.

Evidence that at some other time a witness has said or done something which is inconsistent with the witness' testimony at the trial, may be considered by you for the purpose of judging the credibility of the witness. You may also consider the failure of the witness to disclose information on prior occasions, when the opportunity to do so presented itself as being inconsistent with that witness' testimony at the trial.

Whether a prior statement is inconsistent is a fact question solely for your determination. You also determine whether the failure of a witness to reveal

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1
2 information prior to his testifying before you, for
3 example, in reports or in statements he may have made,
4 is inconsistent with his present testimony. In making
5 that determination you should consider all the facts
6 and circumstances attendant at the time of making the
7 prior statement or the omission of information. In
8 determining whether the prior statement is inconsis-
9 tent with the testimony given before you, you may
10 take into consideration the nature of the examination
11 here, and the purpose of the statement on the prior
12 occasion. You may take into consideration normal
13 variations in retelling an event to determine whether
14 the statements are truly inconsistent or merely a
15 difference in describing an occurrence.

16 It is for you and you alone to determine whether
17 an inconsistency is to a material or immaterial fact,
18 and what effect the inconsistency has on the witness'
19 credibility.

20 A witness, however, may be inaccurate, contra-
21 dictory, or even untruthful in some respects, and yet
22 be entirely credible in the essentials of his testi-
23 mony.

24 The ultimate question for you to decide in passing
25 upon credibility is, did the witness tell the truth

here before you as to essential matters.

If you find that any witness, and this applies alike to government and defense, wilfully testifies falsely as to any material fact, you may have a right to reject the testimony of that witness in its entirety, or you may accept that part or portion which you believe to be credible

The fact that some government witnesses may be government employees does not entitle their testimony to nay greater weight or consideration than that afforded to any other witness in the case. You will evaluate their credibility the same way you do that of any other witnesses.

The weight of the evidence is not necessarily determined by the number of witnesses testifying on either side. You should consider all the facts and circumstances in evidence to determine which of the witnesses are worthy of greater credence. You may find that the testimony of a smaller number of witnesses on one side is more credible than the testimony of a greater number of witnesses on the other side.

If any facts permit inferences which are equally consistent with guilt and with innocence, you may not consider those facts as evidence of guilt. But, if

1
2 you are satisfied from the evidence as a whole that
3 a defendant is guilty beyond a reasonable doubt, you
4 should find a verdict of guilty as to him.

5 As stated before, the law never imposes upon a
6 defendant in a criminal case the burden or duty of
7 calling any witnesses or producing any evidence; nor
8 does the law compel a defendant in a criminal case to
9 take the witness stand and testify.

10 Let me start again, I can't even read my own
11 handwriting. As stated before, now twice, the law
12 never imposes upon a defendant in a criminal case the
13 burden or duty of calling any witnesses or producing
14 any evidence; nor does the law compel a defendant in
15 a criminal case to take the witness stand to testify.

16 On the other hand, the defendant may of course
17 present evidence, and he may, if he chooses, testify
18 as a witness in the case. Here, as you have seen,
19 the defendant Giattino did not testify and as to him
20 no presumption of guilt may be raised, and no infer-
21 ences of any kind may be drawn from his failure to
22 testify.

23 The defendant Raucci did testify. With respect
24 to his testimony you may consider that a defendant
25 has a deep personal interest as a result of his

1
2 prosecution and indeed it is fair to say he has the
3 greatest interest in its outcome.

4 Interest creates a motive for false testimony and
5 a defendant's interest in the result of his trial is
6 of a character possessed by no other witness.

7 In appraising his credibility, you may consider
8 that a defendant has a strong motive to lie to protect
9 himself, but you may also consider that he takes a
10 real risk in subjecting himself to cross-examination.

11 In addition, simply because a person has a vital
12 interest in the end result, it by no means follows
13 that he is not capable of telling the truth and a
14 straight-forward story.

15 It is for you to decide to what extent, if any
16 at all, the defendant's interest has affected or
17 colored his testimony.

18 You will recall yesterday that a Miss Carol Fein
19 testified that she had seen defendant Raucci as a
20 customer in the Doll House on two or three occasions
21 in July of 1976. That testimony was offered for a
22 limited purpose, that is to contradict the testimony
23 of Mr. Raucci that he had never been to the Doll
24 House prior to August 8th, 1976, when he was taken
25 back there by the police officers.

Court's Charge

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2 You should consider Miss Fein's testimony only
3 on the question of credibility. It has no bearing on
4 the elements of the government's direct case.

5 You are to draw no unfavorable inference against
6 the defendants or either of them because of the fact
7 they've been tried here together. You must give
8 separate consideration, and render a separate verdict
9 with respect to each defendant. And each is entitled
10 to have his guilt or innocence determined from his
11 own conduct, and from the evidence which applies to
12 him, as if he were being tried alone. Guilt or
13 innocence is an individual matter, and when you
14 deliberate upon the verdicts in this case, you must
15 determine the guilt or innocence of each defendant
16 separately and individually. You may find either or
17 both of the defendants either guilty or not guilty.

18 I have sought not to comment on the evidence in
19 any detail or to give any impression as to my own
20 view, if I have one, of the relative weight of the
21 evidence. However, if I have done so inadvertently,
22 I ask you to disregard it entirely, because you are
23 the sole judges of the facts.

24 Under your oath as jurors, you cannot allow a
25 consideration of the sentence which may be imposed

1
2 upon a defendant, if he is convicted, to enter into
3 your deliberations, or to influence your verdict in
4 any way. In the event of a conviction, the duty of
5 imposing sentence rests solely with the Court.

6 In your deliberations, you are not to consider
7 whether you approve or disapprove of the statute
8 which the defendants are charged with violating. The
9 only question for you to consider is whether the govern-
10 ment has proved beyond a reasonable doubt the essen-
11 tial elements of the crime as I have explained them.

12 Now, let us discuss your deliberation and how
13 you should go about reaching your verdict.

14 When you retire to the jury room, your first duty
15 will be to elect your foreman or forelady, who will
16 preside over your deliberations.

17 During your deliberations, you should assume the
18 attitude of judges of the facts rather than partisans
19 or advocates. In that way, you will be making a
20 high contribution to the administration of justice.

21 Your duty is to decide the case solely upon the
22 evidence, to weigh the evidence in the case, and to
23 determine the guilt or innocence of the defendants
24 solely upon the basis of such evidence and these in-
25 structions.

Court's Charge

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Each of you, as jurors, is entitled to your own opinion, but each of you should exchange views with your fellow jurors. That is the very purpose of jury deliberation, to discuss and to consider the evidence; to listen to the arguments of your fellow jurors; to present your individual views; to consult with one another; and to reach an agreement based solely and wholly on the evidence, if you can do so without violence to your own individual judgment.

Each of you must decide the case for yourself after consideration with your fellow jurors.

But, you should not hesitate to change an opinion which, after discussion with your fellow jurors, appears to you to be erroneous.

However, if after careful consideration of all the evidence, and the arguments of your fellow jurors, you entertain a conscientious view that differs from others, you are not to yield your judgment simply because you are outnumbered.

Your final vote must reflect your conscientious view as to how the issues should be decided.

The charge here is a most serious one. A just determination of this case is important to the public. It is equally important to these defendants.

Court's Charge

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Under your oath as jurors, you must decide this case without fear or favor, and solely in accordance with the evidence and the law.

If the government has failed to carry its burden as to a defendant, your sworn duty is to acquit. If it has carried its burden as to a defendant, you must not flinch from your sworn duty, you must convict.

Shortly after you retire to deliberate, I will send into you the Exhibits which have been admitted into evidence. If you wish to have some portion of the testimony repeated, you may make that request by a note to the marshal, and I'll then call you back into the Courtroom and have the testimony read back to you.

You must report a verdict as to each defendant. You may find him guilty or not guilty of the charge here. The verdict as to each defendant must be unanimous. The marshal will be available outside the jury room to report when you have reached your verdict and to let me know if there are any questions which you wish to have answered. When you've reached your verdicts and you are ready to report it, simply advise the marshal, but do not reveal your verdict. I'll have your foreman or forelady announce the

verdict orally back here in the Courtroom.

There will now be a short recess during which counsel will review the charge with me, to make certain that nothing has been omitted or misspoken. Please retire briefly to the jury room, but still do not discuss the case until I've brought you back once more which will be very shortly.

(Jury excused.)

THE COURT: Any exceptions or requests?

MR. PASCARELLA: Well, I suppose, Your Honor, since I've been a defense counsel I've never found any judge's charge completely to my liking. But, you had indicated that you might make a further decision with regard to my request No. 6. I haven't heard it.

THE COURT: That is as to whether evidence of eye witness identification is of an inferior type? I made that decision. My failure to include that was not unintentional. I am denying your request.

MR. PASCARELLA: That's even where it has been demonstrated on cross-examination or other witnesses that there is some uncertainty in the testimony?

THE COURT: Yes. I consider the matter covered by my general instructions as to weighing testimony.

MR. PASCARELLA: I may be mistaken, but as to request No. 8, I did not hear the Court charge it and I thought you indicated that you would? I may have just missed it, but I don't recall.

THE COURT: Yes. I did charge it.

MR. THOMPSON: The word compel, among others--

MR. PASCARELLA: It may be the heat in the Courtroom, but--

THE COURT: The Clerk shut off the air-conditioner

MR. THOMPSON: No objection by the government or requests for additional charges.

THE COURT: Now you designate the alternate jurors.

MR. PASCARELLA: Who goes first?

MR. THOMPSON: It's the same order as before.

MR. PASCARELLA: The defendant goes first throughout?

THE COURT: You go first, Mr. Thompson.

MR. THOMPSON: No. 11.

MR. PASCARELLA: I'll take juror No. 14.

THE COURT: Bring them in.

(Jury enters box.)

THE COURT: Ladies and gentlemen, throughout the trial you've been sitting here with 14 jurors. Only

12 of you are permitted to deliberate under the rules that have been established for us.

In some cases, alternate jurors are designated at the beginning of the trial and told they are alternate jurors. That was not done in this case. That is my style, if you will. So, it becomes appropriate now for me to designate who the alternate jurors are.

Those who I am about to name as alternate jurors are excused when the other jurors retire to deliberate. The alternate jurors are free to leave. They may remain if they wish. But, they'll not participate any further in the trial. As to the alternate jurors, the fact that you've been designated as an alternate juror at this point means nothing more than you've been designated and that you do not participate in the deliberations. It does not imply anything with respect to your qualifications or ability or anything else.

Some selection has to be made and that selection is that juror No. 11, Mr. Polasky and juror No. 14, Edward Iffer, will be designated as alternate jurors. The remaining jurors will be the ones to deliberate.

Would you swear in the marshals, please?

(Whereupon, the marshals were sworn to keep the jury.)

1
2 THE COURT: The two alternate jurors, I wish to
3 extend my thanks to you for your participation in
4 the case. It is because we've gone a number of days
5 since you were actually selected as jurors and it is
6 necessary to have alternate jurors to cover the
7 possibility that someone will be taken ill or other-
8 wise be unable to continue to the conclusion of the
9 case. So, I want to thank you for your participation.

10 As to the other 12 jurors, your oaths sum up
11 your duty and that is without fear or favor to any
12 man, you will well and truly try the issues between
13 these parties according to the evidence given to you
14 in this Court and the laws of the United States.

15 The room in which you will deliberate is not the
16 room that you are used to, but another room in the
17 building to which the marshals will escort you. I
18 would suggest you go by way of the jury room here,
19 pick up any personal belongings you may have left in
20 there. Then the marshals will take you to the other
21 jury room where you will deliberate and as I indi-
22 cated I'll send you the Exhibits very shortly.

23 You may now retire to the jury room and begin
24 your deliberations.

25 (Whereupon, the jury retired to begin their

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

DOCKET NO. 76 CR 714

- against -

MEMORANDUM AND ORDER

PATSY JOHN RAUCCI and
PETER FRANK GIATTINO,

Defendants.

PRATT, J:

By jury verdict rendered on May 6, 1977 defendants were convicted of firebombing a building located on the south side of Sunrise Highway at Oakdale, Suffolk County. Defendants were apprehended while fleeing the scene of the bombing in the early morning hours of August 8, 1976.

Officer Reiersen testified that while on patrol approaching the Doll House he saw a flash of fire and as he pulled up to the parking lot he saw a car leave in a hurry. Setting off in hot pursuit, he finally apprehended the defendants with the aid of another officer some two miles from the Doll House.

While defendant Giattino did not testify, defendant Raucci did, denying participation in the firebombing and

claiming that he and Giattino had turned their car into the path of Officer Reiersen and had pulled to a stop as soon as they realized that Reiersen was pursuing them. His position was that Reiersen had confused his car with the one he had seen fleeing the Doll House parking lot. Thus, a sharp and decisive issue of credibility was presented to the jury; either Reiersen was mistaken, or Raucci was lying. Determination of that issue for all practical purposes would resolve the issue of the defendants' guilt.

While being cross-examined, Raucci stated emphatically and dramatically that he had never been to the Doll House until taken there by Officer Reiersen after he was arrested. In rebuttal the government called Carol Fein who had formerly been a barmaid at the Doll House. She identified Raucci as having been a customer at the Doll House in either June or July, 1976. Both on cross-examination of Fein and on a surrebuttal case, defendants sought to undercut Fein's testimony. The jury ultimately found both defendants guilty of possessing a molotov cocktail. 26 USC §§5861(d) & 5871.

When Fein was first called as a witness, defendants' counsel objected to her testifying on the ground that

during pretrial discovery he had been informed by the government that they had no witnesses who could place Raucchi at the Doll House although they did have witnesses who could place Giattino there. Defense counsel claimed that he had relied on what he had been told by the government, that defendant Raucchi insisted he had never been at the Doll House, and that to permit Fein to testify to the contrary would be prejudicial. When asked what prejudice he would suffer he questioned the validity of the identification and said there were a "number of considerations", but specified only the question of whether or not defendant Raucchi would have taken the stand. Defense counsel insisted he had been "misled" but did not (and still does not) claim that the Assistant U. S. Attorney (AUSA) or the government's case agent had deliberately misled him. After 20 or 25 minutes of argument, the court found no misconduct, either intentional or constructive, on the part of the government, overruled the objection and permitted Miss Fein to testify.

The next day, before the jury retired, defense counsel moved to strike Fein's testimony, arguing that her identification of defendant Raucchi was the result of improper and impermissible suggestion. That motion was denied.

After the jury retired, there was further argument concerning Fein's testimony and its impact on the case. The entire matter was reviewed by counsel and the court, with agent Jensen supplying some additional information. The question was not then resolved but left so that defendants should make a formal written motion in the event of a guilty verdict.

On May 27, 1977, defendants made that formal motion seeking to set aside the verdict and requesting either a judgment of acquittal or in the alternative a new trial. After several adjournments an evidentiary hearing was held on July 21, 1977 commencing at approximately 4:00 P.M. Testimony was presented by both sides on two questions: (1) Was defense counsel misled? and (2) Had Fein's identification been the result of impermissible suggestion by the government? Testimony concluded at approximately 1:15 A.M. and was followed by oral argument of counsel for approximately one-half hour. Prehearing briefs had been submitted by both counsel. By the time of the hearing, AUSA Thompson had left the government's employ and entered the private practice of law. At the hearing, the government was represented by AUSA Russo.

I.

Defendants' claims of this motion divide into two parts (1) that their counsel was misled, and (2) that Fein's testimony should not have been permitted. On the "misled" claim, defendants argue that there had been an understanding with the government that discovery in this case would be "open"; that defense counsel was informed on January 4 and January 5, 1977 that the government had no witnesses who could place Raucci at the Doll House, but they could place Giattino there prior to the firebombing; and that although the government learned five days later that Fein could place Raucci at the Doll House, it never revealed that fact to defense counsel, thereby permitting him to proceed with preparation of the case on the assumption that there were no government witnesses who could place Raucci at the Doll House. When asked by the court what he would have done differently had he received from the government the new information to which he claims he was entitled, defense counsel said that he might have investigated Fein, requested a lineup, asked for a hearing prior to her testimony so as to learn additional factors about which to cross-examine her, and reconsidered whether to put defendant Raucci on the wit-

ness stand (but counsel conceded he probably would have in any event).^{1/}

On the "merits" of Fein's testimony, defendants claim that there were impermissibly suggestive procedures followed by the government at several stages in its dealings with Fein, including her initial photo identification of defendant Raucci on January 10, 1977, her review of the same photos prior to testifying, and a claimed "show-up" identification of Raucci in the hall outside the courtroom shortly prior to her testifying.

The government contends that defense counsel could not have been improperly misled because he was not entitled to any disclosure concerning the government's rebuttal testimony. In addition, the government contends that there was no impermissible suggestion preceding Fein's testimony and that in any event under the "totality of circumstances" test her testimony was reliable.

^{1/} Without Raucci's testimony there would have been nothing to contradict Officer Reiersen's version of the facts, a version which was heavily corroborated by the testimony of other police officers. The result of Raucci's failure to take the stand almost certainly would have been a conviction.

The government further argues that the entire matter pertains to a collateral issue, since the identification in question did not directly connect a defendant with the crime, but instead pertained only to the credibility of defendant Raucci when he dramatically asserted he had never previously been to the Doll House.

II.

The court has studied counsel's briefs carefully, has reviewed the transcripts of the pertinent portions of the testimony and the colloquy which occurred on May 5, and May 6, 1977 at the trial, has carefully reviewed the testimony of the witnesses at the hearing, and has attempted to reconcile conflicting versions of the facts and where necessary to resolve the contradictions. As a result, the court has made the following findings of fact and reached the conclusions hereinafter indicated. The findings can best be set forth in a chronological recitation of the facts as the court finds them to have occurred based on all the evidence in the record.

On August 8, 1976 two molotov cocktails were thrown onto the roof of a building on the southside of Sunrise Highway at Oakdale, Suffolk County, Occupying the first floor

of the building was a topless bar called the Doll House. On the second floor were offices of the Long Island Press and of A & P Services, a booking agent for topless dancers.

Defendants, who were apprehended fleeing from the direction of the fire, were indicted on November 12, 1976. In mid-December, 1976 AUSA Thompson was assigned to take over prosecution of the case which was scheduled for a pretrial conference on January 5, 1977. AUSA Thompson called defense counsel on the telephone, informed him he was new on the case and indicated to him that pretrial discovery could proceed on an informal basis if defense counsel would request it by letter. On December 27, 1976 defense counsel sent to AUSA Thompson the discovery request, and the two attorneys met with the case agent both on January 4 and January 5. In the course of discussions about the case, defense counsel was shown a number of photographs, was orally given the names of potential witnesses for the government, and was told of the government's theory that the firebombing had been directed not at the Doll House but at the office of the booking agency for topless dancers located on the second floor.

Defense counsel asked if either of the defendants had been identified as having been at the premises. He was

told that the owners of the Doll House and the managers of the two upstairs businesses had both been to the police station the morning of the arrest and had failed to identify the defendants. Defense counsel was further told that while defendant Giattino had been identified as having frequented not only the Doll House but other topless bars, neither the bouncer nor one of the barmaids had been able to identify defendant Raucci as having been at the Doll House, nor did the government then have witnesses to place defendant Raucci at other topless bars.

On January 10, 1977 AUSA Thompson and agent Jensen visited the Doll House and questioned the employees there as well as the people upstairs. Their purpose was to try to develop a motive or a pattern of activity which would help explain the firebombing and defendants' connection with it. As part of their questioning they had with them mug shots of five persons whom they connected with topless dancer activities; two of the mug shots were of the defendants. In addition, they had a full length, ^{pic} seven-year-old photograph of defendant Raucci in a business suit.

The last Doll House employee interviewed by Thompson and Jensen was Carol Fein. When she arrived at

Originally at trial
Tolson said cleared
3 plans

work for the evening shift at about 7:00 P.M., she was sent to the boss's office and shown the five mug shots. When asked if she could identify any of the five as having been a customer at the Doll House, she picked out defendant Raucci. She said he had been a customer at the Doll House two or three times and that she remembered him because he wore a brightly flowered shirt, cocked his head to the side, had been sarcastic, and had said something to annoy her. When questioned at the hearing about what Raucci had said to annoy her, she said he had referred to one of the dancers as an "animal", and when pressed as to whether she had heard similar remarks from other customers, she said in substance "some people just get to you; he got to me".

Not consistent
with what
Tolson testified to.

Although Fein recognized two of the other mug shots, she did not say so on January 10 because the men pictured in them had not been customers at the Doll House.

What about
discrepancy
to who showed
in full length
photo

After she had identified Raucci's mug shot, she was shown the seven-year-old picture of Raucci in a business suit. She did not recognize Raucci in that picture, either as a customer of the Doll House or as the person in the mug shot of Raucci she had seen a few moments earlier.

What about
discrepancy
to who showed
in full length
photo
he 10 was
uncertain

*was in Atlanta
they were from
Atlanta
if latter*

*Fein didn't
she say she
knew others
in photos.*

Fein was not told at the time why she was asked to look at the pictures; only later did she learn that it had something to do with the firebombing which had occurred five months earlier. At the time, Jensen and Thompson were digging deeper into the question of a motive for the firebombing, and the Doll House was the first of some 25 topless bars where some 200 to 300 persons were interviewed and shown the five mug shots to see if they could place any of the pictured individuals in topless bars. Neither Thompson nor Jensen then thought of Fein as a potential witness at the trial. Although Jensen made a note in his diary for January 10 stating "barmaid I.D. Raucci" (meaning that a barmaid had identified Raucci), neither Thompson nor Jensen had any contact whatsoever with Fein until May 5, 1977 after Raucci testified he had never been inside the Doll House.

*not so
- kind other
persons*

Jensen's investigation of the other topless bars also produced persons who could identify both Giattino and Raucci as patrons. Early in February, 1977, defendant Raucci was arrested and indicted on counterfeiting charges. He retained the same defense counsel, and for a period of time AUSA Thompson also handled the counterfeiting case. In the six to eight weeks following January 10, there were

numerous conversations between defense counsel and AUSA Thompson; agent Jensen participated in some of them. In the course of those conversations defense counsel was told both by Jensen and by Thompson that witnesses could place both Raucci and Giattino in various topless bars in Nassau and Suffolk counties. Defense counsel responded on more than one occasion that he had consulted with his clients about that, that they had told him that while Giattino occasionally visited such places Raucci never did, and that the government's information to the contrary was not correct.

In addition, in connection with the counterfeiting matter, Thompson told defense counsel that a number of counterfeit bills of the same denomination and series Raucci had been arrested for had been turning up in topless bars and they were checking further Raucci's activities in those bars; Thompson also told defense counsel that they had witnesses to connect Raucci to topless bars. The response again was that Raucci did not do that sort of thing.

All witnesses agreed, with one insignificant exception, that the government had not told defense counsel that there were any witnesses who could place Raucci specifically at the Doll House; all witnesses, without ex-

ception, agreed that the government had not told defense counsel that it was Fein specifically who could place Raucci at the Doll House. The only conflict in testimony was whether the government informed defense counsel that there were witnesses who could place Raucci in various topless bars without specifying the Doll House.

At the hearing, defense counsel denied any recollection of ever having been told that the government had witnesses to place Raucci in topless bars; but Jensen and Thompson insisted they had told him. Balancing their clear recollection against defense counsel's failure of recollection, the court finds the testimony of Jensen and Thompson on this point to be accurate.

At the trial, when Raucci was being cross-examined about the parking lot in front of the Doll House where he was taken after he was arrested, the following then occurred:

Q. Had you ever seen that immediate area that you were observing when you were sitting there in Officer Colligan's car before that time?

A. No, I never seen the Doll House in my whole

entire life.

Q. Have you ever been inside the Doll House?

A. In my whole entire life, no. I never was in Suffolk County that far. Tr. 765-66.

The court specifically recalls that in giving the foregoing answers Raucci raised his voice and nearly rose out of the witness stand, thereby dramatizing his denial of any prior contact with the Doll House.

At that time agent Jensen was sitting at counsel table. He wrote a note to AUSA Thompson to the effect that they had witnesses who could place Raucci at the Doll House. Thompson instructed him to contact those witnesses. Jensen then made telephone calls to Fein and one other barmaid at the Doll House. Shortly thereafter (ten pages in the transcript) the trial was recessed for lunch. The court's notes indicate the recess occurred at 1:15 P.M. A longer than usual luncheon recess was taken because of a settlement conference held by the court, followed by two sentence proceedings in which AUSA Thompson represented the government. The trial resumed at 2:50 P.M. Early in the luncheon recess Thompson spoke to Fein on the telephone and succeeded in

persuading her to come to the courthouse to testify. Jensen had been unsuccessful in convincing the other barmaid to come.

Fein came to the courthouse and was met by Jensen in the first floor lobby. Jensen brought her up in the elevator and escorted her from the elevator through the public corridor to the lobby area in the vicinity of the courtrooms, where he turned immediately to his left and escorted Fein into the U.S. Attorney's offices, which are situated on the same floor as the courtrooms and approximately 50 feet from their public entrance. There was no conversation between Jensen and Fein while he was taking her to the U.S. Attorney's offices. Although Fein recognized Raucci standing in the hall near the courtroom entrance as she walked along with Jensen, she did not say anything to Jensen about it.

After the sentence proceedings and prior to resumption of the testimony, Thompson spoke briefly to Fein in the U.S. Attorney's office.

During the course of the trial, Thompson followed the practice of having government witnesses come into the hall outside the courtroom door immediately prior to their being called to testify, thereby obviating the unnecessary

*understanding
after trial
court - in case
transformed
at present
it show up.*

*Not!
so.
=*

*Call
Court
witness*

P-049

delays which otherwise would occur in bringing new witnesses into the trial.

*Thompson
has said
this*

*Then why did
Jensen not
bring Fein
into the
hallway
earlier?*

The trial resumed at 2:50^{2/} with further cross-examination of Raucci, followed by defense witnesses DeFelice, who testified at 3:20, and Basilicato, who testified at 3:35. Near the end of Basilicato's direct examination, Thompson, apparently planning a short cross-examination, and anticipating that the defense was about to rest, instructed Jensen to bring Fein into the hallway near the courtroom door so that she would be available when called.

When Basilicato's direct examination concluded at 3:42, the court announced a short recess indicating that it had to hear a "quick motion". Tr. 817. That motion was a Rule 35 motion in U.S.A. v. Haimson. No one in the courtroom had any advance knowledge that the court was about to recess or that the Haimson motion was about to be heard. The argument of the motion was brief, and at 3:53 P.M. the trial resumed. The transcript indicates that neither defendant was then present, for which defense counsel apologized stating "I thought they followed me [into the courtroom]". After a

^{2/} All time references are taken from the court's own trial notes.

*Basilicato testified that
Carol Fein had
been sitting beside her
in the courtroom*

*Carol Fein
came to
courtroom
and testified
in recess*

brief cross-examination of Basilicato, the defendants rested at 4:00 P.M., whereupon Thompson called Carol Fein as a rebuttal witness. Before she was brought into the courtroom, however, a lengthy argument, out of the presence of the jury, was had as to whether or not she should be permitted to testify.

One of the defendants' claims is that an improper "show-up" occurred in the hall at which agent Jensen pointed out defendant Raucci to Fein prior to her entering the courtroom to testify. Three witnesses testified on the point: Fein, Jensen, and one Lee Johnson, who had accompanied another unrelated defendant to the courthouse that afternoon to attend a status conference which ultimately was held at about 4:45 P.M., after the Raucci-Giattino trial recessed for the day.

Johnson testified both as a surrebuttal witness at the trial and as a witness at the hearing. According to him, he had been standing in the lobby area in front of the courtroom facing in the direction of the elevators. He saw Fein and Jensen leave the elevators, come down the corridor toward him, move to their left and stand against the north wall of the lobby area facing in the direction of the defendants who were standing near the courtroom entrance on

the south wall of the lobby area.^{3/} Johnson testified that agent Jensen spoke to Fein who spoke back to him, that Jensen pointed in the direction of the defendants, that Jensen and Fein remained in the lobby area for approximately five minutes and then left down the corridor leading to the entrance of the U.S. Attorney's office.

According to Johnson, when agent Jensen pointed in the direction of the defendants, Raucci shouted across the lobby area to his attorney, objecting to Jensen's pointing at him.^{4/} At the hearing, defense counsel stated that he did not hear Raucci shouting at him.

According to Johnson, he had not been paid to testify, his testimony had been solicited by defense counsel in the lobby late in the afternoon on May 5 following the testimony by Fein, and defense counsel had approached nearly everyone in the lobby to see if they had witnessed anything in connection with agent Jensen or Fein.

The testimony by Jensen and Fein sharply contra-

^{3/} While Johnson did not estimate it, the distance between the two described locations would be approximately 20 feet.

^{4/} The maximum width of the lobby from the south to the north wall at this point is approximately 25 feet.

dicts that of Johnson. While consistent in their major particulars, Fein and Jensen did disagree on one significant point. Jensen testified that he brought Fein up the elevator and took her directly into the U.S. Attorney's office. Later, when he left the courtroom and went to the U.S. Attorney's office to bring Fein into the corridor to be ready to testify, he guided her out of the U.S. Attorney's office into the lobby area, looked through the window of the courtroom and saw that the trial was not in progress, guided Fein across the lobby area to look into the bankruptcy courtroom situated on the north side of the lobby, 25 feet away from the district courtroom, and while there nodded in the direction of the defendants whom he had noticed standing with several women near the district courtroom door, and said to Fein, "Do you see anyone that you recognize?". According to Jensen, Fein responded either "yes" or "uh-huh". Jensen then led Fein back to the U.S. Attorney's office, having spent a minute or less, total, in the lobby area with Fein. While walking with Fein, Jensen said to her that the man she had identified in the photo (Raucci) had been standing out in the hall. Fein replied, in substance, "Yes, I know. I saw him when I got off the elevator."

at trial - Jensen said he didn't recall

Jensen denied that he had pointed toward Raucchi; he also denied that he had his arm around Fein.

*also said
Aug 21/40
2:30*

Fein's testimony in large measure corroborated that of agent Jensen. According to her, Jensen met her on the first floor and brought her up to the fourth floor in the elevator. She said there was no conversation while they walked from the elevator to the U.S. Attorney's office, but that she did notice Raucchi standing near the courtroom door as they passed through the lobby area. She testified that this was between 2:30 and 3:00 P.M. She was led into the U.S. Attorney's office where she waited some period of time. A number of Suffolk County police officers were there also, in connection with this case. While there, she saw the mug shot photographs and the seven-year-old photograph of Raucchi. Then she was led by agent Jensen out into the lobby area where Jensen led her from one courtroom door to another. Jensen told her that the trial was not ready for her yet and they would have to go back to the office. According to her, when she turned away from the district courtroom door to return with Jensen to the U.S. Attorney's office, she saw Raucchi standing about four or five feet away from her. She said Jensen had said nothing to her, and she did not see him nod

or point in Raucci's direction.

Walking back to the office Fein commented on Raucci's shirt which was purple. Jensen responded: "Oh! You saw him?" She said that she had, not only immediately preceding in the hall, but also earlier when she got off the elevator. Back in the U.S. Attorney's office, Thompson came into the office briefly and reassured her about her testimony; she did not tell Thompson she had seen Raucci in the hall.

The court has studied the testimonies of Jensen, Fein, and Johnson, matching them up with the court's own notes as to the particular times of various breaks in the course of the trial. Weighing all of the evidence, the court finds that the actual facts as they occurred in connection with the alleged "show-up" are as follows: Jensen met Fein in the downstairs lobby at approximately 2:30 P.M. and led her directly to the U.S. Attorney's office on the fourth floor. They did not stop in the lobby area near the courtroom entrance, but Fein happened to see and recognize Raucci there. While in the U.S. Attorney's office, Fein was shown the five mug shots and the seven-year-old picture of Raucci which had been exhibited to her on January 10. At the time she arrived, AUSA Thompson was engaged in sentence proceedings

before the court involving unrelated defendants. When those sentencing proceedings were concluded, Thompson went across the hall to the U.S. Attorney's office and met briefly with Fein, returning to the courtroom for resumption of the cross-examination of Raucci at approximately 2:50 P.M.

When Thompson expected the direct testimony of the defendants' last witness to end shortly, he sent Jensen from the courtroom to get Fein and bring her into the hall so that she would be available when called as a rebuttal witness. Shortly after Jensen departed, the court took an unexpected recess, so that when Jensen returned with Fein to the hall, the defendants, their wives and defense counsel, and perhaps others participating in the trial, were standing outside the courtroom in the lobby area. Jensen looked into the courtroom to find AUSA Thompson, but Thompson was not participating in the Rule 35 motion in USA v. Haimson. then (between 3:42 and 3:52 P.M.) being heard by the court. Still looking for Thompson, Jensen stepped across the hall, glanced into the bankruptcy courtroom, and then returned with Fein to the U.S. Attorney's office. There seems to be no doubt but that Jensen nodded in the direction of the defendants and asked if there was anyone there Fein recognized. 'Appar-

ently, she did not hear him, although he thought he heard an affirmative response. It is clear that as they walked back to the U.S. Attorney's office there was discussion about Raucci's presence in the lobby area, and at that time Fein acknowledged that she had seen Raucci in the lobby not only then, but also earlier when she had exited the elevator. During the brief time that Jensen and Fein were in the lobby area, a number of people including the defendants were there. The area is not large, its maximum dimensions being 25' x 33'. Fein was undoubtedly nervous and self-conscious, perhaps even afraid.

Handwritten:
Jensen and Fein
in lobby, he
and saw
four people
in lobby at
the time of
off elevator.

Although Mr. Johnson's testimony sharply contradicted the Jensen-Fein version, I find his testimony to be incredible. It would be unthinkable for agent Jensen to have brought Miss Fein onto the fourth floor, into the lobby area in the presence of the defendants, and to have kept her there for five minutes without any initial conversation with her. Johnson's testimony that they came directly from the elevator and stopped in the lobby area is incorrect. Johnson made a point that Raucci not only saw Jensen pointing at him, but shouted to his attorney who could have been no more than 25 feet away; yet his attorney insists he never heard anything

Handwritten:
Johnson
and Fein
in lobby

about it. In this respect, I also find Johnson to be inaccurate. Indeed, had the "show-up" occurred in the manner described by Johnson, then the same event could have been testified to by Raucci, Giattino, their respective wives, and the other women friends who were with them at the time. Raucci, Giattino and their wives all attended the hearing and despite the sharp conflict in testimonies, none of them took the witness stand to corroborate Johnson. Counsel's only explanation for that was that the hour was late and it would have been a waste of time.

Under all the circumstances, I reject the testimony of Johnson and conclude that Fein's viewing of Raucci in the hall immediately prior to her testifying was accidental, unintended, and unplanned by the government, and had no effect upon her testimony. Her identification of Raucci was certain and positive; indeed, she had independently recognized him as she first went to the U.S. Attorney's office at a time when Jensen was not even aware Raucci was present in the hallway.

III.

With the foregoing facts in mind, the court now

turns to its conclusions with respect to the various arguments raised on this motion.

Defendants' first argument is that defense counsel was misled by the information supplied to him and by other information withheld from him in the course of pretrial discovery. The government did not supply false information, nor do defendants even contend that they did. At the time that defense counsel inquired about possible identifications of the defendants, the discussion focused upon witnesses who could identify them as having been at the scene of the crime at the time of the crime or shortly before. Defense counsel was told, accurately, that there were no witnesses other than officer Reiersen who could make that identification. The government also told defense counsel that they had been able to place Giattino at the Doll House and in other topless bars, but thus far (January 5th) had not been able to do so with Raucci. Subsequently, the government informed defense counsel that they had witnesses to place Raucci at various topless bars; he was not told who the witnesses were, nor was he told that the Doll House was one of the bars.

I conclude that there was no deliberate misleading of defense counsel by the government. The record shows com-

plete good faith on the part of the government. When they learned of Fein's ability to place Raucci at the Doll House, they attached no particular significance to it because they did not perceive any related circumstances which would spell out the motive they were then looking for. AUSA Thompson did not intend to use Fein as a witness. Certainly, he did not intentionally conceal her existence or her potential testimony from defense counsel.

The only reason she was called as a witness was to attack the credibility of defendant Raucci who had dramatically insisted that he had never been inside the Doll House. That sudden twist in the trial provided an opening on an important point of credibility which AUSA Thompson seized upon and turned to his advantage, all well within the parameters of a fair trial and proper conduct by the prosecution.

Further, defense counsel's claim that he "relied" upon the inability of the government to place Raucci in the Doll House sounds hollow. Presumably, defense counsel is not claiming that Raucci relied upon advance notice that the government could not contradict him on the point and therefore took the stand and intentionally lied about not being

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Cover
Hammerton

in the Doll House.

The most the defendants can claim in this regard is that they anticipated that if Raucci testified he might be asked if he had ever been to the Doll House, that in order to tell the truth Raucci would have to testify that he never patronized the Doll House, and that had they been aware that a government witness would testify to the contrary (presumably in error), then they would not have put Raucci on the stand at all, on the assumption that the erroneous testimony of the government witness would be believed and that Raucci's entire testimony would be undermined by his truthful statement on this one point. However, if defense counsel believed Raucci was telling the truth, he could not in the circumstances of this case reasonably have kept him off the witness stand simply because of a possibility that a government witness would contradict him with a lie, or an erroneous identification. True, the key issue in this case was one of credibility, but it was not Raucci v. Fein; it was Raucci v. Officer Reierson. If defendants did not present a witness to contradict Reierson, a guilty verdict was almost certain.

Moreover, as the government argues, the whole question of Carol Fein's testimony is collateral to the

central issue of guilt and innocence. Even if the jury concluded that Fein's identification of Raucci was erroneous, that conclusion would not detract from officer Reiersen's credibility; it would only have blunted a government thrust at the heart of Raucci's credibility. True, if the jury believed Fein, then they necessarily would find that Raucci lied on a collateral point that might or might not carry over in their minds to the essentials of his testimony.

Defense counsel urges that had he known of Fein as a potential witness, he could have investigated her for material to attack her credibility. However, there would have been no obligation on the government to disclose her identity in advance. Nor did it appear at the hearing that any information damaging to her credibility had been uncovered in the six weeks since the trial.

Finally, on this point, since nothing in Rule 16 or any other of the Rules of Criminal Procedure required the government to disclose the proposed testimony of its rebuttal witnesses, defendants had no right to the information they now claim was concealed from them.

Turning to whether or not Fein's identification

was the result of improperly suggestive procedures, we must first consider whether or not the rules barring identification under suggestive circumstances apply here. When Fein first recognized Raucci's photograph, the government was engaged in a general investigation covering topless bars and booking agencies for topless dancers, and was trying to discern a connection between those activities and the five individuals they suspected were somehow involved. Fein was not the victim of a crime who was asked to identify her assailant; she was merely asked if she recognized any of the five men as customers at the Doll House. She did not know why she was being asked the question. Consequently, nothing in the circumstances would call for invocation of the rule barring suggestive procedures in connection with a photo spread.

Moreover, the procedures used were not suggestive. The photographs in question are basically similar, all being color mug shots taken of individuals who are not significantly different from each other. All were white with dark hair, except Giattino, who is balding. Obviously, there were individual differences, but nothing in particular that would suggest to Fein that for some reason or other she should

*Jensen only
+ testimony
indicating Fein
was in lobby
before Raucchi at same time
identification being - Fein
was not intended as a
photographic*

identify Raucchi as a past customer of the Doll House.

*1st time
she came
out -
strange*

*not so
occurred
during
lunch recess*

not so [

Nor were the identifications of Raucchi by Fein on May 5 fatally suggestive. Most significant in this regard is the fact that by pure happenstance and without any prompting from the government Fein recognized Raucchi immediately after her arrival on the fourth floor and thus prior both to seeing the photographs again in the U.S. Attorney's office and to viewing Raucchi just prior to testifying (the alleged "show-up"). The "show-up" was not prearranged by the government, but was an accidental result of the court's having unexpectedly called a recess to hear an argument in an unrelated case. At that time Fein was brought into the hall, Jensen believed that the trial was still in progress, that in a very few minutes the cross-examination of defendants' last witness would terminate, and that Fein would soon be needed as the government's rebuttal witness. See U.S. v. DiStefano, Doc. No. 76-1581, slip op. 3539,3551 (CA2 May 16, 1977).

Finally, in this connection, under Manson v. Braithwaite, 44 US LW 4681 (June 16, 1977), assuming the identification procedures were impermissibly suggestive, the key question -- "the linchpin" -- in determining whether or not Fein's identification testimony should have been admitted

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is reliability. On that point the evidence is overwhelming that her testimony was reliable. Her "opportunity to view" Raucci occurred on at least two occasions when he attended the Doll House where she worked as a barmaid. On both occasions she served him, he remained there for periods ranging from one-quarter of an hour to three-quarters of an hour. Throughout those periods she was within approximately seven feet of him.

As to "degree of attention", although she did not study him closely throughout the entire period, she did testify that "he got to me" because of his sarcastic manner, the way he cocked his head, and the insulting remark he had made about one of the dancers. She distinctly recalled his flowered sportshirt and the way he cocked his head. During Raucci's testimony at the trial the court noted the distinctive "cocked head" mannerism to which Fein referred. Significantly, she had mentioned this to AUSA Thompson and to agent Jensen on January 10 when she first recognized Raucci's photograph.

*point point
looked
head on
stared
Jensen told
Fein
not to Thompson*

There can be no doubt about Fein's "level of certainty". She testified several times that she was certain and positive that Raucci was the man she had seen in the Doll

House. Jensen corroborated that testimony. AUSA Thompson had informed the court when the initial argument arose on May 5, that her identification of Raucci had been uncertain on January 10. He later explained, however, that she had readily picked Raucci out of the group of five mug shots, but did not recognize the seven-year-old photograph of him in a business suit. Fein and Jensen agree that she failed to recognize the seven-year-old photograph. Clearly, when AUSA Thompson initially argued the point of admissibility of Fein's testimony before the court, it was without extensive preparation, and his characterization of her identification as being "uncertain" represented his overall interpretation of her reaction to the two photographs and in no way implied any lack of certainty on her part as to recognizing Raucci's mug shot (Ex. R).

As to the "time between the crime and the confrontation", we are dealing here with the time between Raucci's visiting the Doll House in June or July of 1976 and the time Fein was shown the mug shots in January, 1977, a period of six or seven months. Of the five indicators discussed in Manson v. Braithwaite, supra, only this last one, the lapse of time, tends to detract from the reliability of Fein's

*Supplies of Thompson's evidence
we would have
said some things
more helpful
to court*

*in fact
why
I told
the judge
that*

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testimony.

The court's own evaluation of Fein as a witness, having observed her testify on two occasions, is that she was believable, sincere, precise and accurate both in her observations and in her use of language. She appeared resistant to suggestion both by government counsel and defense counsel. True, there were some discrepancies between her testimony and that of agent Jensen, and there were a few minor inconsistencies in her own testimony. Of major significance, however, is the complete absence of any motive to lie about Raucci's having been a customer at the Doll House. Prior to the events in question, she did not know Raucci, or agent Jensen, or AUSA Thompson. She had a brief interview with Jensen and Thompson in January of 1977, with no hint at that time that she would ever be needed again. She had no contact with either of them until she was called on May 5 and asked to please come to the courthouse and testify.

There is nothing to indicate that Fein did anything other than her duty as a citizen and to tell the truth as she remembered it. She insisted upon the accuracy of her identification of Raucci; her description of his sarcastic attitude and the manner of cocking his head to the side were

*show discrepancies
bet. Fein &
Jensen
+ discred.
w/ Jensen &
Thompson*

*what about
Jensen's
complete absence
of motive to
lie*

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-4

both confirmed at the trial by Raucci's own behavior on the witness stand. Other than the minor discrepancies as to what happened in the crowded lobby outside the courtroom prior to her testimony when she was being led by agent Jensen, there is nothing in this record to challenge her testimony in any way. Those small discrepancies are understandable and explainable by the difficult circumstances in which she found herself, her anxiety about testifying (which she had never done before), and perhaps her fear at having been involved as a witness in a trial which resulted from a firebombing.

One final matter requires discussion. Defendants urge that Brady v. Maryland, 373 US 83 (1963), required the government to inform defense counsel prior to cross-examination that Fein had failed to identify Raucci in Exhibit Y (the seven-year-old business suit photograph) on the same occasion when she did recognize him in Exhibit R (the then current mug shot of Raucci in a sport shirt). Concealment of that fact, according to defendants, deprived them of a valuable argument against Fein's credibility. Under Brady, of course, the prosecution is required to disclose any "exculpatory matter" which would be "material". As noted by the Supreme Court in United States v. Agurs, 96 S Ct 2392, at

2401 (1975):

The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

As applied to this record, the omitted evidence is merely the failure of Fein to recognize Raucci in the seven-year-old picture. Had that evidence been added, it would not have generated a reasonable doubt as to the guilt of the defendants. Indeed, the evidence did not bear directly upon guilt or innocence at all, but merely affected what the government has insisted throughout was a collateral issue, namely the credibility of Fein who contradicted Raucci on a minor point which was brought out in his cross-examination.

*which, when
has occurred or
omitted or
as false
point, but
subsequent*

The balance between guilt and innocence in this case was determined by officer Reiersen's testimony which was not significantly shaken on cross-examination nor contradicted by any other evidence in the case. His story was simple and straightforward: he saw the flash of fire, speeded to the Doll House, saw a car leaving rapidly, took up pursuit never losing sight of the fleeing car, and pulled the defendants over some two miles away.

when they were not arrested. When told he was arrested for arson, Raucchi did not even inquire as to what had been burned. If his story were correct, that Reiersen had mistaken his car for the getaway car, Raucchi's conduct would undoubtedly have been much different at the time of his arrest.

Thus, the government's failure to disclose Fein's inability to recognize Raucchi in Exhibit Y was not "material" in the constitutional sense and, therefore, did not deny the defendants due process of law.

Accordingly, defendants' motion to set aside the verdict and to enter a judgment of acquittal, or in the alternative to order a new trial, must be denied.

SO ORDERED.

Dated: Westbury, New York
August 11, 1977.

A handwritten signature in dark ink, appearing to read "G. C. Pratt", is written above a horizontal line.

GEORGE C. PRATT
U. S. DISTRICT JUDGE

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James A. Pascarella

Attorney

and

Counselor

at Law

Telephones:

(516) 742-1134

(516) 742-1135

*One Old Country Road
Carle Place, New York 11514*

August 19, 1977

Honorable George C. Pratt
United States District Court
900 Ellison Avenue
Westbury, New York 11590

RE: U. S. A. v. Giattino and
Raucci
76 CR 714

Dear Judge Pratt:

I have read your recent decision on the defendants' motion pursuant to Rule 29 of the Federal Rules of Criminal Procedure. At page 24 of that decision, you indicated that neither the defendants nor their wives and relatives testified at the hearing to corroborate Lee Johnson's testimony.

As the Court knows, Mr. Johnson finished testifying at approximately 1:15 a.m. At that time, I indicated to the Court that certain relatives and the defendants could substantially corroborate Johnson's testimony, but I made a decision, at that moment, not to call them as witnesses because it was late and because I felt they could be viewed as having an interest in the outcome of the case and, so, of no significant impact. After all, I firmly believed, and still believe, Mr. Johnson was a totally independent witness, with no particular interest in the outcome of the case, perhaps, in that sense, being unique among all the witnesses who testified at the hearing.

Honorable George C. Pratt

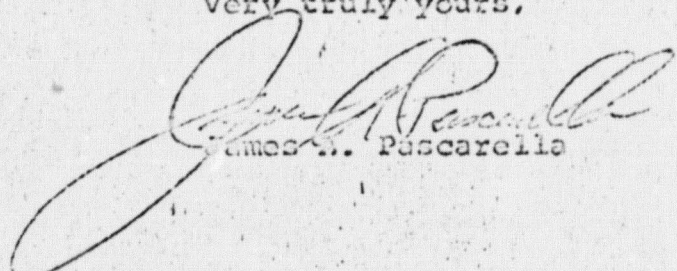
- 2 -

August 19, 1977

I do feel now, however, that in making its decision, the Court may have used as a basis the fact that neither the defendants nor their wives and relatives testified to corroborate Johnson. If this feeling is correct, then, I, of course, made the wrong decision at that late hour. In fairness to the defendants, I must say that affidavits from the defendants and relatives who witnessed the "show up" could be forwarded to the Court if it so desired. Further, if the Court desired to reopen the hearing and hear testimony, these people would be willing and available to testify.

I have taken the liberty of apprising the Court of the above because, frankly, this aspect of the decision, in particular, has caused me some concern. I believe, therefore, it is incumbent upon me, in fairness to the defendants, to advise the Court as I have and to respectfully request of the Court that it accept either the above referred to affidavits or testimony as the Court may deem necessary to a just decision.

Very truly yours,



James H. Pascarella

JAP/ml

cc: Ronald Russo, Esq.
United States Attorney's Office
Federal Building
225 Cadman Plaza East
Brooklyn, New York 11201

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

DOCKET NO. 76 CR 714

- against -

GIATTINO and RAUCCI,

O R D E R

Defendants.

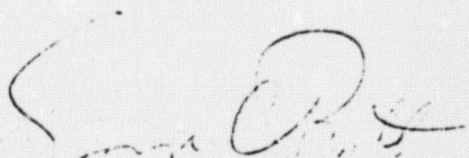
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PRATT, J:

Treating defendants' counsel's letter dated August 19, 1977, as a motion for reconsideration of the court's order of August 11, 1977, the motion is denied.

SO ORDERED.

Dated: Westbury, New York
August 24, 1977.



GEORGE C. PRATT
U. S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

PETER FRANK GIATTINO and
PATSY JOHN RAUCCI

NOTICE OF MOTION

76 CR 714

SIR:

PLEASE TAKE NOTICE that upon the annexed affidavit of JAMES A. PASCARELLA, sworn to on the 9th day of September, 1977, the annexed exhibits and upon all the prior pleadings and proceedings heretofore had herein, the defendants PETER FRANK GIATTINO and PATSY JOHN RAUCCI will move this Court at the United States Court House, 900 Ellison Avenue, Westbury, New York, before the Honorable George C. Pratt, on the 15th day of September, 1977, at 10:00 a.m. in the forenoon or as soon thereafter as counsel can be heard for an order pursuant to Rule 33 of the Federal Rules of Criminal Procedure granting defendants a new trial in the interest of justice and on the ground of newly discovered evidence.

In the alternative, defendants move this Court to grant the taking of additional testimony as part of the hearing previously held on the admissability of the testimony at trial of one Carol Fenn.

Dated: Carle Place, New York
September 9, 1977

Yours, etc.

JAMES A. PASCARELLA
Attorney for Defendants
One Old Country Road
Carle Place, New York 11514

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X	:	
UNITED STATES OF AMERICA,	:	
	:	
-against-	:	<u>AFFIDAVIT</u>
	:	
PETER FRANK GIATTINO and	:	76 CR 714
PATSY JOHN RAUCCI	:	
-----X	:	

STATE OF NEW YORK)
)
COUNTY OF NASSAU) ss.:

JAMES A. PASCARELLA, being duly sworn, deposes and says:

1. I am the attorney for the defendants and am familiar with the pertinent facts herein. This affidavit is submitted in support of a motion for a new trial, or in the alternative, for the taking of additional testimony as part of a hearing previously held on the admissability of the testimony at trial of one Carol Fein.

2. The defendants were convicted, after a jury trial, of Count Two of a three count indictment (Counts One and Three having been dismissed by the Court after conclusion of all the evidence at trial), charging them with unlawfully possessing destructive devices, the said devices not registered to the defendants in the National Firearms and Transfer Record in violation of Title 26 United States Code, Section 586(d).

3. After conviction, a hearing was had (on July 21, 1977) upon the motion of defendants seeking to set aside the verdict of guilty returned against each defendant.

4. The Court denied the above-said motion by memorandum and order dated August 11, 1977.

122 11

5. On September 1, 1977, the defendants were sentenced by the Court and defendants indicated they would each file a Notice of Appeal. Both defendants received a stay of execution of sentence pending appeal.

6. During the sentencing, a number of defendants' friends and relatives were in the courtroom. After sentencing, there came a time when your deponent left the courthouse with the defendants and a group of their friends and relatives. Outside on the courthouse steps, your deponent was asked several questions about the case and the sentence by various of these people. In general discussion, your deponent mentioned that he had reviewed a number of times the court's written decision dated August 11, 1977, and one of the findings of the Court that troubled your deponent was the finding that Carol Fein, in the presence of Agent John Jensen, saw the defendant Raucci in the hall outside of the courtroom during an unexpected eleven minute recess between 3:42 p.m. and 3:53 p.m. and that Jensen and Fein were in the hall not to view Raucci in a "show-up" but were awaiting Carol Fein's being called as a Government rebuttal witness.

7. One of the persons in the group involved in the above conversation, Doris Massari, indicated that Carol Fein viewed defendant Raucci in the hall before the 3:42 p.m. to 3:53 p.m. recess. Mrs. Massari indicated to me that she saw Ms. Fein and Agent Jensen viewing the defendant Raucci in the hall, and this was during the lunch recess, which, according to the Court's statement, was between 1:15 p.m. and 2:50 p.m. Mrs. Massari stated that on May 5, 1977, she left work at her nearby job in Mineola to attend the trial of the defendants and that she arrived during the lunch

recess. She stated that she stayed until approximately 2:40 p.m. Your deponent was further told by Mrs. Massari that she is sure of the approximate time because she arrived at home just in time for her children coming home from school (at approximately 3:00 p.m.) and then took one of her children to a 3:30 p.m. doctor's appointment. Further, Mrs. Massari states that the defendant Raucci had yet to resume cross-examination before she left and that her husband was not in the courthouse when she left the building. Her husband arrived at approximately 3:00 p.m.

8. The statements and events related to your deponent by Mrs. Massari and referred to herein are set forth at length in the affidavit of Doris Massari, annexed to this motion. A copy of records showing the time she left work on May 5, 1977 to attend the trial and relating to her taking her child to the doctor on that date are also annexed.

9. Upon your deponent speaking to Mr. Massari, he was advised that Mr. Massari arrived in the courthouse on May 5, 1977 to attend the trial of the defendants somewhere in the vicinity of 3:00 p.m., during the time the defendant Raucci resumed the witness stand in cross-examination. He further advised your deponent that upon his arrival, he had been informed by others at the trial that his wife, Doris Massari, had left the courthouse some minutes before his arrival.

10. The statements of Mr. Massari referred to herein are set forth at greater length in the affidavit of Mr. Massari annexed hereto.

11. Your deponent recalls Mrs. Massari being present at the trial on May 5, 1977, and further recalls Mr. Massari arriving in the courtroom shortly after Mrs. Massari left the courthouse.

12. It is submitted that the above referred to evidence is important especially in light of the Court's findings regarding the show-up, the credibility of Agent Jensen and Lee Johnson and the credibility and realibility of Carol Fein.

13. The Court found with regard to the "show-up" that it was not arranged by the Government but mere happenstance, occurring during an unexpectedly called recess while Carol Fein and Agent Jensen were waiting in the hall at the direction of Assistant U. S. Attorney Edward Thompson, in accordance with the "practice" of the Government of having witnesses come into the hall outside the courtroom immediately prior to being called to testify. The Court further found that although Carol Fein told no one about it, when she first got off the elevator (during the lunch recess) with Agent Jensen, she saw and recognized the defendant Raucci in the hall. (Presumably, this goes to the reliability of and lack of suggestion to Carol Fein.)

14. The new evidence shows that Carol Fein viewed defendant Raucci sometime during the lunch recess and in the presence of Agent Jensen. This means she could not possibly have been in the hall "waiting" to be called as a witness" because, indeed, cross-examination of Raucci had not yet been completed and there were, as far as the Government knew, and, in fact, more defense witnesses to be called. This was not a show-up during an unexpectedly called recess and occurring by chance.

15. The new evidence gives more weight to the testimony of a by-stander who witnessed the show-up, Lee Johnson. It becomes clearer that, as Johnson testified, Jensen and Fein viewed Raucci in the hall and engaged in conversation and pointing gestures after

coming directly from the elevator and before going to the United States Attorney's office. This would certainly mean the show-up was improper.

16. It also becomes clear that Carol Fein and Agent Jensen lied, or, at the very least, were mistaken. This necessarily reflects upon their credibility and upon the reliability of Carol Fein.

17. The said evidence is not merely cumulative or impeaching in nature but is of such a nature and so material that it might well mean Carol Fein's identification testimony was inadmissible. A new trial without Carol Fein's testimony would probably produce a different verdict.

18. The new evidence first came to the knowledge of your deponent as explained hereinabove and this motion was brought as soon as possible.

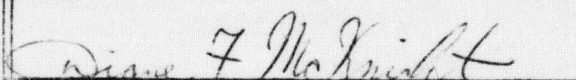
19. On information and belief, the interest of justice will be served if this motion is granted.

WHEREFORE, the within relief should be granted in all respects and a new trial ordered, or, at least, additional testimony relating to this new evidence should be taken at a hearing relating to the admissibility of Carol Fein's testimony.

Dated: Carle Place, New York
September 9, 1977


JAMES A. PASCARELLA

Sworn to before me
this 9TH day of September, 1977


Notary Public

DIANE F. MCKNIGHT
NOTARY PUBLIC, State of New York
No. 4654512
Qualified in Nassau County
Commission Expires March 30, 1982

UNITED STATES DISTRICT COURT
EASTERN DISTRICT

-----X
: UNITED STATES OF AMERICA, :
: :
: -against- : AFFIDAVIT
: : 76 CR 714
: PETER FRANK GIATTINO and :
: PATSY JOHN RAUCCI, :
: :
: Defendants. :
: :
-----X

STATE OF NEW YORK)
)
COUNTY OF NASSAU) ss.:

DORIS MASSARI, being duly sworn, deposes and says:

1. I am the sister of Barbara Raucci, wife of the defendant, Patsy John Raucci.
2. I attended the trial of the above defendants on May 5, 1977, between the approximate hours of 1:40 p.m. and 2:40 p.m.
3. I arrived in the courtroom at about 1:40 p.m., coming straight from my place of employment in Mineola which I left at 1:30 p.m.
4. During the lunch recess on May 5, 1977, I saw Agent John Jensen and a person I later learned to be Carol Fein, looking at the defendant, Patsy John Raucci. Agent Jensen had his arm around Fein and nodded and pointed in the direction of Patsy John Raucci and Peter Giattino who were engaged in conversation in a group which included myself, Barbara Raucci, Josephine Giattino, Francis Naclerio and Anna DiGregorio. Agent Jensen and Carol Fein spoke with each other during this time and remained viewing the above said group for several minutes. Jensen and Fein were near

the entrance to the courtroom across from Judge Pratt's courtroom.

5. At the time of occurrence, I thought that perhaps Carol Fein was a girlfriend of Agent Jensen.

6. The above occurred during the lunch recess on May 5, 1977, in the hall outside of Judge George C. Pratt's courtroom. I did not see where Agent Jensen and Ms. Fein originally came from before they looked at the defendant Raucci.

7. The above occurred at about the time of the sentencing which took place during the lunch recess just prior to my leaving the courthouse.

8. The above occurred at around 2:30 p.m. because I left the courthouse at approximately 2:40 p.m. to be sure to be home in time for my children arriving from school, which was about 3:00 p.m.; I arrived home in Massapequa on this date just before my children did. I also know I left the courthouse before the defendant Raucci resumed cross-examination.

9. I did not return to the courthouse on May 5, 1977 after leaving about 2:40 p.m. After getting home, I took my eleven year old daughter Debra to the office of Dr. Jacob Issacson (Wantagh Pediatric Association) for a 3:30 p.m. appointment. She received a complete check up as was required by her school.

9. Annexed to my affidavit is a copy of the record which shows that I left work on May 5, 1977 at 1:30 p.m. Attached also is evidence of the fact of the above said doctor's appointment.

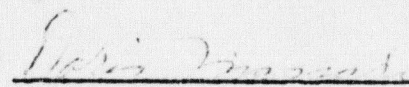
10. On May 5, 1977, in the early evening, I learned from my husband, Michael Massari, that he arrived at the courthouse a short time after I had left.

11. On September 1, 1977, I attended the sentencing of the defendants Patsy John Raucci and Peter Frank Giatfino. After

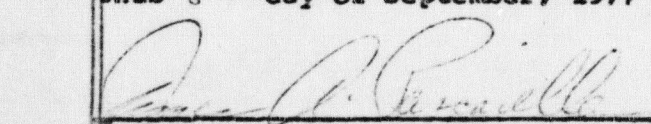
sentencing, the defendants, their wives, myself, my husband and several other relatives and friends, along with defense counsel, James A. Pascarella, left the courthouse. Outside of the courthouse, a number of the group engaged in question asking of and conversation with Mr. Pascarella. At one point, in discussing the Court's decision of August 11, 1977, relating to the hearing held in this case, Mr. Pascarella stated the Court had found that Carol Fein and Agent Jensen viewed the defendant Raucchi during an unexpected Court-called recess between 3:42 p.m. and 3:53 p.m. while Fein was waiting to be called as a witness. I then informed Mr. Pascarella that I saw Ms. Fein and Agent Jensen view the defendant Raucchi in the hall outside the courtroom during the lunch recess and that this had to be before 2:40 p.m., for I left the courthouse at approximately that time to go home and meet my children coming home from school.

12. Later, during the evening of September 1, 1977, I called Mr. Pascarella at his home and advised him that I had further remembered I took my daughter Debra to Dr. Isaacson for a 3:30 p.m. appointment after leaving the courthouse, arriving home and meeting my children.

Dated: Carle Place, New York
September 8, 1977


DORIS MASSARI

Sworn to before me
this 8th day of September, 1977


JAMES A. PASCARELLA
Notary Public, New York
Qualified: [illegible]
Commission Expires March 1978

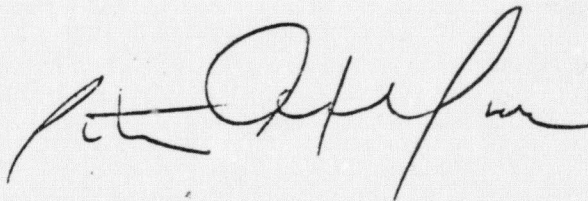
NY 020-11

WANTAGH PEDIATRIC ASSOCIATES, P.C.
SIDNEY ISAACSON, M.D., F.A.A.P.,
PETER AXEL, M.D., F.A.A.P.
ABRAHAM GREENBERG, M.D., F.A.A.P.
2975 JERUSALEM AVENUE
WANTAGH, NEW YORK 11793
TELEPHONE CASTLE 1-5151

NAME Debra M. Isaacson DATE _____

INSTRUCTIONS

Debra M. Isaacson was
in our office for an
examination on 5/5/77,
at approximately 3:30 p.m.



WANTAGH PEDIATRIC ASSOCIATES, P. C.

2975 JERUSALEM AVE.
WANTAGH, N. Y. 11793

S. Isaacson, M.D., F.A.A.P.
P. Axel, M.D., F.A.A.P.
A. Greenberg, M.D., F.A.A.P.

150

PAYROLL WEEK ENDING

2-6-77 77 Dares Missouri
SS-080 32-2860

• DAYS AND HOURS		• WAGES				• EMPLOYEE DEDUCTIONS							• NET AMOUNT PAYABLE	YEAR OFF OR FOLD for GDT-LEAF effect
Sub Ending		WAGE BASE	ADJ. WAGE	OVERTIME WAGES	TOTAL WAGES	FED. TAX	SS. TAX	STAT. TAX	UNEMP. TAX	HEALTH INSUR.	TOTAL DISC.			
1	MTWTF													
2	8:7-6:7-4				155.00	9.86	19.50	5.70	.30				120.04	✓
3	7:7-7:6-7				174.75	10.22	20.90	6.50	.30				132.53	✓
4	-6:7-6-6				115.00	6.73	11.40	3.60	.30				95.93	✓
5					200.00								200.00	✓
6	6:6-4:5-3				111.25	6.56	11.40	3.60	.30				89.45	✓
7	6:6-5:4-4				137.50	8.44	16.40	4.90	.30				107.86	✓
8	5:5-6:5-4				132.50	7.75	15.00	4.60	.30				104.45	✓
9	5:5-5:6-5				135.00	7.90	15.40	4.50	.30				106.90	✓
10	5:5-6:4-6-5				133.75	7.81	15.40	4.50	.30				105.75	✓
11	6:5-6:5-6				147.50	8.63	14.30	5.20	.30				119.08	✓
12	6:6-6:5-5				146.25	8.55	14.30	5.20	.30				117.90	✓
13	6:6-6:6-5				152.00	9.07	15.70	5.60	.30				124.33	✓
14	5:5-6:5-3				132.50	7.75	11.60	4.50	.30				108.35	✓
15	Thurs 3rd of Mo				150.00	8.97	14.30	5.00	.30				121.43	✓
					2026.00	106.55	199.40	63.90	3.90				1654.15	

UNITED STATES DISTRICT COURT
EASTERN DISTRICT

-----X
: UNITED STATES OF AMERICA, :
: :
: -against- : AFFIDAVIT
: :
: PETER FRANK GIATTINO and : 76 CR 714
: PATSY JOHN RAUCCI, :
: :
: Defendants. :
: :
-----X

STATE OF NEW YORK)
)
COUNTY OF NASSAU) ss.:

MICHAEL MASSARI, being duly sworn, deposes and says:

1. I am the husband of Doris Massari, who is the sister of Barbara Raucci, who is the wife of the defendant Patsy John Raucci.

2. On May 5, 1977, I attended the trial of the above said defendants.

3. I arrived at the courthouse at approximately 3:00 p.m. on that date. Upon my arrival, I was advised by several family members already in the courthouse that my wife had just left.

4. When I arrived, the defendant Raucci was on the witness stand being cross-examined.

5. I arrived at the courthouse after leaving a showing of a film for the American Cancer Society at the Floating Hospital, Pier 15, Fulton and South Streets in New York City. I left Manhattan at approximately 1:45 p.m. and arrived at the Westbury Courthouse at approximately 3:00 p.m.

Dated: Carle Place, New York
September 8, 1977

MICHAEL MASSARI

Sworn to before me
this 8th day of September, 1977

Notary

JAMES A. SPENCER
Notary Public, New York
No. 1
Qualified in County
Commission Expires March 23, 1938

UNITED STATES DISTRICT COURT
EASTERN DISTRICT

-----X	:	
UNITED STATES OF AMERICA,	:	
	:	
-against-	:	<u>AFFIDAVIT</u>
	:	
PETER FRANK GIATTINO and	:	76 CR 714
PATSY JOHN RAUCCI,	:	
	:	
Defendants.	:	
-----X	:	

STATE OF NEW YORK)
)
COUNTY OF NASSAU) ss.:

BARBARA RAUCCI, being duly sworn, deposes and says;

1. I am the wife of the defendant Patsy John Raucci.

2. I was in attendance at the trial of my husband
during its entirety.

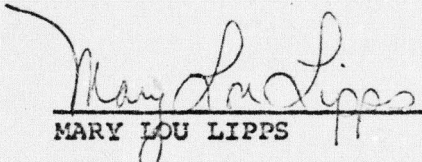
3. On May 5, 1977, during a recess in the trial,
I saw Agent John Jensen and Carol Fein. They were standing in
the hall outside of Judge George C. Pratt's courtroom and next to
the telephone booth adjacent to the courtroom just across from
Judge Pratt's. They engaged in conversation with each other. I
also saw Agent Jensen nod and with his right hand, which he had
around Fein's shoulder, make a pointing gesture in the direction
of my husband who was standing in the hall in a group which in-
cluded myself, co-defendant Peter Giattino, my mother, Francis
Maclerio, my sister, Doris Massari, Josephine Giattino and Anna
DiGregorio. Jensen and Fein were in the hall as above-said for a
period of some five to seven minutes.

AFFIDAVIT OF MAILING

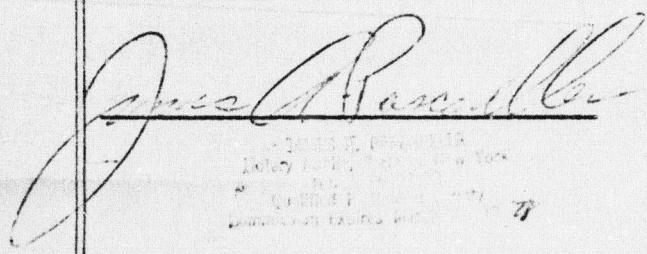
STATE OF NEW YORK
COUNTY OF NASSAU, ss.:

MARY LOU LIPPS, being duly sworn, deposes and says that on the 9th day of September, 1977, I served a true copy of the annexed Notice of Motion and Affidavit on the Office of the United States Attorney, Eastern District of New York, by depositing aforesaid true copy enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York, such wrapper being directed to the persons hereinafter named, at a place and address stated below:

Hon. David Trager
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201


MARY LOU LIPPS

Sworn to this 9th day
of September, 1977


JAMES E. [illegible]
Deputy Clerk, Eastern District of New York
7

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - x
UNITED STATES OF AMERICA

- against -

DOCKET NO. 76 CR 714

PATSY JOHN RAUCCI and
PETER FRANK GIATTINO,

MEMORANDUM AND ORDER

Defendants.
- - - - - x

PRATT, J:

By memorandum and order dated August 11, 1977, this court denied defendants' motion to set aside the verdict and seeking either a judgment of acquittal or a new trial. A decision was rendered after a lengthy post-verdict hearing which had been held on the late afternoon and evening of July 21, 1977. By notice of motion dated September 9, 1977, defendants have moved again for a new trial. As alternative relief, they request the court to take additional testimony as part of the hearing held on the prior motion. The positions of the parties are clearly set forth in the affidavits filed on September 12, 1977 in support of the motion and the affidavit and memorandum by the government filed on November 1, 1977 in opposition thereto. For the reasons articulated by the government in its opposing papers the motion is denied.

SO ORDERED.

Dated: Westbury, New York
November 4, 1977.



GEORGE C. PRATT
U. S. DISTRICT JUDGE

137

12/21/76 Call from Ed Thompson - EDNY - He is now assigned case - I told him - as per my discussion at Woodfield - I will make informal discovery reports. -
He wants to speak further re case - I will call him.

12/27/76 Called Thompson - not in.

12/27/76 Thompson called back - I advised him of discovery letter.

- He said file will be open. - Will give me all info.

Re statements - said sublocus type - ie - colloquy bet. officer & one of D's - ie. - Cop. - "if I had gotten here 10 min earlier, I would have shot you." D - if 10 min. earlier, I wouldn't have seen.

ALFO - Unlike Woodfield - Thompson said there are fingerprints - report not complete checked for further info. - Set up meeting in Westing - Jan 4, 1977 - at 10:00

Thompson will have police reports by then.

Probably won't have final fingerprint report.

1/4/76 Met w/ E. Thompson & agent John
Jensen in Westbury office - see notes

1/5/76 Appeared Westbury - Judge Pratt
- Advised Judge P conducted good
deal of discovery - further will be
forthcoming -
Trial - end of March, beginning of
April. Pick jury Feb. 23, 1977 (Judge
not sure if morning or afternoon)
Will make any motions re suppression
- dep. on further info from U. S. Atty

1/5/76 Spoke w/ Thompson & Jensen - see
Notes

1/5/76 Spoke w/ Russi & Ciattino - see
notes

1/11/76 Went to EDNY - Spoke w/ Thompson
(1) He will speak w/ Patrick Henry (ADA Suffolk)
re case. Thompson knows on for hearing
in Hempstead on 1/17. Thompson will call

me - Apparently, Suffolk has not declined to prosecute as he thought.

Also - Thompson not clear as to context in which alleged statements made. He will check further w/ police (ie. - re: "I don't like the guy" statement - Thompson said could have been - Quir "why did you do it. - or don't you like the guy?" - Quir "I don't like the guy?")

Also - I informed Thompson D's say they're innocent - no cooperation

Further - Thompson will check further re confusion by police as to who I made statement. - Pausi tells me he brought statement he saw on complaint to atty of Rincon not Miller (who claims he did typing & he (Miller) was confused).

1/2/77

In E.D.N.Y. - Spoke w/ Thompson - He spoke w/ Patrick Hany - in Suffolk - They will wait to see what happens w/ Fed. prosecution.

Also - ^{Suffolk} may hit ~~with~~ traffic violation

NOTE - Suffolk police make type of radio calls - but destroy after 90 days. - They have made & destroyed in this case.

2/10/77 Returned Ed Thompson's call of yesterday.
He is now handling counterfeiting case, too.

Re: ATF case -

Check with
FBI for case
re: Thompson
records.

Re: record of Reinson - Thompson said
clean record

I asked for ~~Reinson~~ Reinson record
- Thompson said he will try to get record.

Counterfeit case - Will have tapes w/ him
on Monday

4-6 count indictment

Conspiracy & 3 sales

One sale discussed on tape (\$40,000 at 9 points).

Also Pansci said on tape that wife
will contact "Phil" - not him.

Thompson wants to know if can work
out plan re both cases.

2/18/77 Spoke w/ Edw. Thompson - He's amenable
to putting off jury selection until next
month

2/22/77 Called Judge Pratt's Chambers - Spoke w/ Law
Clark - I indicated I will definitely be free
end of March for trial i. Can we select

judg March 23 rather than Feb. 23? - I
would prefer not having jury sitting
around for a month on this type of case -
AUSA Thompson is agreeable to this.
- Judge's clerk will speak w/ judge &
get back to me.

2/22/77 (John Burns)
Law Clerk called back - Judge wants to go ahead
w/ jury selection tomorrow - Of pref. results
- then will select new jury in March.

2/23/77 Westbury Court House - Conf - Judge
Patt's chamber - Edw. Thompson present
- Also John Burns -

Moved in int. of justice to select jury on
3/23/77 - Since jury may result in
period bet. jury sel. & trial - Also, Thompson
pointed out D (Potter) may be indicted in
another (counterfeiting) case before this trial &
may get adverse publicity. -

Judge adj. jury selection to 3/23/77 -
Call about 1 week before to check on trial
schedule.

Spoke w/ Thompson - said Suffolk
won't give over P.O. Keenan's record.
- May have to subpoena

3/18/77 - Call from AUSA Edw. Thompson - see notes

3/21/77 Alton called - says may have problem - wants to discuss w me.

3/21/77 Spoke w/ Chuck Perce - judge's law clerk - He advised trial will not start this week

3/21/77 ~ 3:15 p.m. Call from Edw. Thompson - see notes

3/22/77 Call from Edw. Thompson - Judge's clerk contacted him - Jury selection at 11:30 a.m. I will meet Thompson at 10:30 a.m.

3/22/77 Both D's at office.

3/23/77 at Westbury Court House - AUSA Thompson's office Agent Jones present. - Saw 2 films of scene of approach to Doll House - I'll let Thompson know on Monday if I consent to use A's - Fingerprint report coming tomorrow. Photos were not avail. today - will be available tomorrow in Westbury at 11:00 a.m. I also discussed w/ Thompson fact that I had over 9,000 miles on it - couldn't read - (see notes)

Re: Files
Jones
said
Ransom
was at "check
pt" w/
in office
who found
off before
of check -
2 persons
disputed etc

note Thompson told me non compliance re \$5122 was
(failure to register & failure to identify lie-mail
number)

Throught counts II & III were duplications
in that same charge alleged in Count I.

Appeared in Judge Buttl's chamber -
Went over thoroughly point re conflict
of interest - It was determined there was
none.

Also - Case now on trial wouldn't be
able to reach us until end of next
week - Thompson will be leaving
April 9 - April 25 on Reserve duty. -
∴ trial will be put off until after
4/25. -

I asked (twice) that - in acc. w/ my
request of 2/23/77 - jury not be selected
now & wait more than a month -
esp. since Puccio may be indicted
in counterfeit case & the jury would
be familiar w/ his name & more apt to
cause prejudice. Judge said we will
select jury now & if any prob. at
time of trial, then will select new
jury.

Also - I advised Judge Buttl I felt
charges in indictment were duplications
esp. in light of fact Thompson told me

today the motions not in compliance
w/ § 5822 were the failure to request
& failure to ~~comply~~ ^{identify} — There — it is
same charge as 5861(d) & (e). — Judge
seemed to agree w/ my argument —
Thompson opposed. — Judge said I
should submit — as I intended
written motions.

Jury selected. bet 12:40 and
1:55.

Note — in conversation w/ Thompson —
he indicated Person may have been
"goofing off" previous to his
seeing flash.

Also — he advised judge one P.O.
whom will be P.O. ^{Peter} ~~Robert~~ Dean —
Who is he?

- 3/24/77 Met w/ AUSA Thompson & fingerprint expert
Gary Walton in Westbury — See Notes
3/24/77 Met w/ Guttus & Detective in office.
3/26/77 Met Guttus & Kussie & went to scene —
took pictures

4/4/77 Spoke w/ Marco Carbone (99-55 163 Rd.,
Howard Beach, Queens 11414; (212) 835-5414)
He will be available to be a
witness for Rausci - re previous
employment.

4/4/77 Rausci called - I told him that Carbone
called. - I also advised him to be sure to
have Giattino contact witnesses from card
game.

4/5/77 Called AUSA Thompson - at work - not
in - left message for him to call me.

4/7/77 Called AUSA Thompson - left message.

4/20/77 Rec'd call from John Bunn - Pratt's law clerk -
Wants to go to trial on 4/25/77 - Will
go on 4/26/77 at 10:00 - If I have any
problem getting car together, I will contact
him - also - He is waiting to hear
from Thompson.

4/20/77 Called Giattino re above - advised him to
get in touch w/ witnesses from card game

4/20/77 Called Rausci at work - no answer.
1.40

- 4/20/77 Called Lausier again - This time spoke w/ him. advised him of trial date, etc.
- 4/20/77 Called John Burn - Pratt's law clerk - in conference - He left message - trial still on for Tuesday.
- 4/21/77 Spoke w/ Lausier & Gethers.
- 4/22/77 ~~Spoke w/ Gethers~~ Gethers in office w/ Pat Basileato. - See notes.
- 4/22/77 Called John Burn - not in.
- 4/25/77 Call from Edw. Thompson - not happy about starting tomorrow - will speak at Judge's Club - also guess of publicity & maybe selecting new jury.
Further - we (Thompson & I) were to get together to decide various points - see notes.
Also - Thompson told me he probably will discuss Court I - Will let me know for sure this afternoon.
- 4/25/77 John Burn (Pratt's clerk called) - He advised trial put off until 5/2/77.

11/4/76

10:30 -

11:45

Appeared in Westbury Office - U.S. Attorney

Present: Myself

Edw. Thompson - AUSA

John Jensen - ATF agent

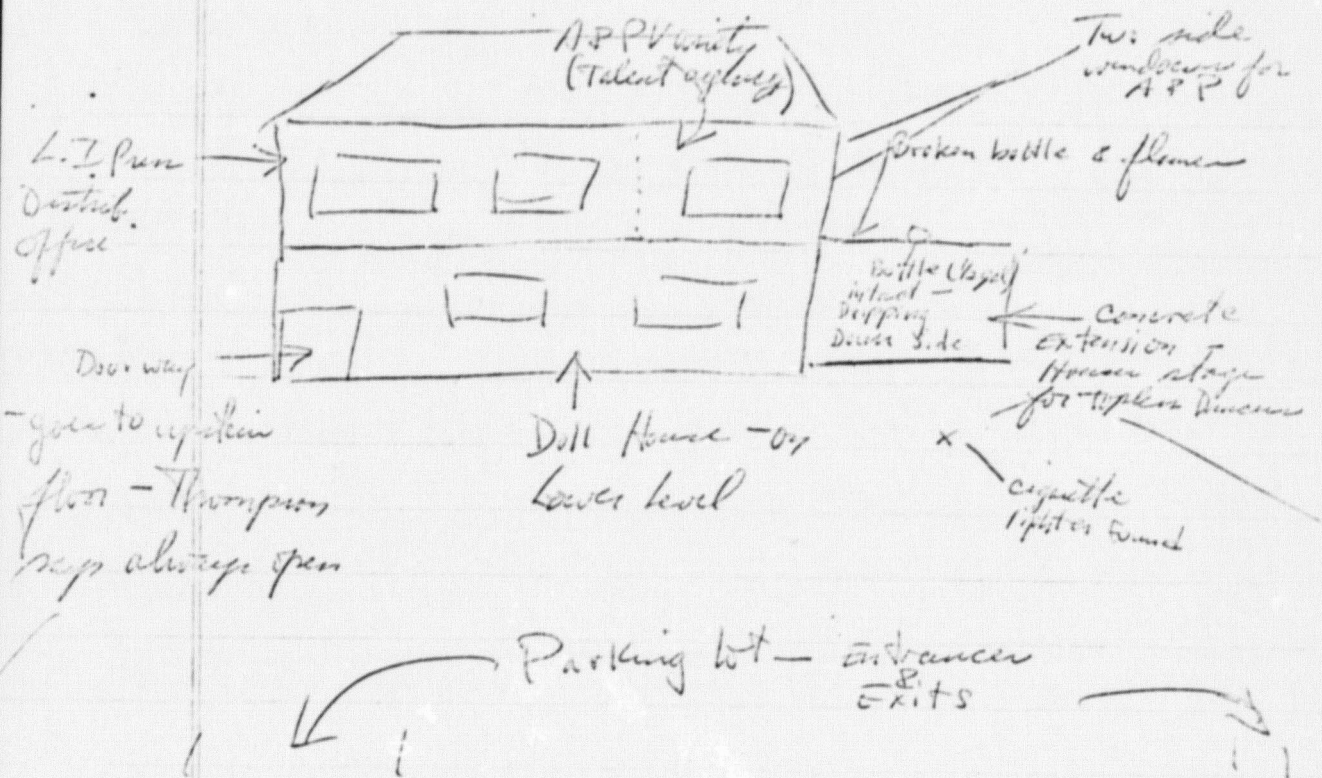
Thompson gave over various discovery
~~materials~~ materials

Also - Showed me 2 photos of roof of
section of Doll House (Shye area) - where one
bottle broke & one remained intact -

The flames were on the roof & side of
this section.

Photos show only a little charring -
Apparently, only tar paper on roof - in some
spot-melted.

Thompson & Jensen showed me about
18 smaller color photos. - Jensen
took - shows direction officer
Pierson was going in along Sunnyside Hwy,
point at which he saw flames
(apparently, at this pt. - west of
Doll House obscured by road signs),
point at which he pulled up to Doll
House (w/ panoramic view of Doll House
in photos) and point where he saw
D's car & where car started & fled.



Occupancy of Bldg

1. Top Floor

E.W. Thompson indicated - certain overtones - ie - c.c.?
 (a) A&P Vanity (talent agency - books Topless & bottomless dancers
 (b) L.I. Press distrib office

2. Doll House on lower level - Thomas Esq. & female friend over(?) phone.

Jensen & Thompson described what occurred - ie - Pierson (had been hanging around - probably goofing off with another P.O. in another car they passed & started to patrol) - going east on Sunrise highway (toward Doll House - on south side of road) - saw flower

of flower. - Drove up to Dell House
Saw car leaving parking lot -
- Prison in front of Dell House at this
time. -

Car sped off - 80 - 85 mph -
Turned down Fairfield Ave (passed a red
light) - avoided "blockade" of P.O. Colligan's
vehicle - about 200-300 ft. further
down - D's stopped - etc.

Wished D's
didn't stop at
phone for
permit red light
- then could
indicate
D's weren't
making to
report fine
other cop
of them.

Cops (P.O. Rhodes who came on scene) saw
painter gloves in car - but didn't seize.
Left car on side of road.
[- Why did cops leave car there?]

Wish
Glover were
in compartment.

Thompson will check further on various
items for me:

1. Was anyone brought to present
to try & ID D's.
- 2. Fingerprint report - any further
findings
- 3. Rucchi's arrest record + disposition.
4. ^{supporting} Affidavit of Esqro
5. Conf. in reports re who said "Yeh,
I don't like the guy." - once P.O. says
Rucchi, another time says Grattino.
- 6. Thompson will check at Suffolk re what they will

Prompner indicated witnesses will probably be

- (1) P.O. Furman
 - (2) P.O. Collique
 - (3) P.O. Rhodes
 - (4) Det. Miller
 - (5) Jensen
 - (6) Lab People (HAF)
 - (7) Ergo ^{real name to} _{name not correct name R or G.}
 - (8) Someone from NRP
 - (9) Owner of Bldg.
- Suffolk Police

Fingerprints - Can't say, from trace, if they
are or aren't D's. - No value.

Past records -

(1) 1930 - Crutcher arrested for robbery.

(2) Rancei has several arrests for CRSP
- ie 1967 - EDNY - Co-Def. Columbia -
records indicate trial & conviction (felony?)
- Prompner will check & let me know

(ie. If Rancei - prior felon - then given
of furman another crime)

U.S. has Motor Veh. Bur. report - show location
course of vehicle

Note - was raining on D/O.

Thompson & Jensen feel D's were trying for A.P.P.
safer from Doll House.

- Felt there were - "overtones" in this
business - i.e. - competition between
secret agencies, etc. Jensen indicated a lucrative bus.
↓

- Seems to me - if trying for A.P.P. -
would try from front - big window
(better target) & wouldn't have to ~~climb~~ ^{climb} over
heavy 2 gallon over concrete structure (steep slope).
To get to A.P.P.'s side window.

A.P.P. largest of this type agency.

U.S. feels D's may have been trying to
destroy A.P.P.'s files of girls - would
put Jensen out of business - girls would
have to go to other agencies

- May be a more overall interest of
this secret agency business

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Thompson: Jones said Giatthas known at
Doll House - as a customer - was
in bar a few days before incident

Giatthas always gets drunk, loud &
obscene towards dancing girls.

Also - Giatthas had ~ \$400 (2 - \$100's,
2 - \$50's, etc) on him at time of arrest
(Note - Jones said police may have lost
property record - I may be able to corroborate
on this - or use it idea re card
game) - U. S. finds this very
suspicious - esp. since Giatthas unemployed.

"Normal" amt of \$ found on Rancie.

U. S. "imprisoned" w/ names in Rancie's
address book.

Thompson offered deal re coop - if
D's will provide names & re who asked
them to do job - & testify - Then D's
may "walk" out of Pen one.

Thompson (or did Woodfield) said
Suffolk will decline prosecution, (esp.

since only a low felony - ie - nothing
burned) -

I indicated I was told by Patrick
Henry of DA's office - They will wait &
see what happens in fed. case.

Thompson will check into this &
advise me.

Note - Thompson & Jensen said Suffolk
ran no scientific tests - all done by
ATF

Also - Thompson mentioned A.P. Phad
rec'd. threats - including bomb threats.

15177

1. T says Miller not Benson typed report & complaint
& Miller confused re Benson & Guttmann

Now - Guttmann said nothing are together

2. ID in precinct

Esqro

Lyn Novotny

Elm. Perench - A.P.P

Collected ID Patsy - never saw before

No definite ID of Guttmann -
no ID

Photo ID - Benson Tim Gemmell
at Dell House

He knows Guttmann as having been
a customer. \$

Benson & girl not able to ID Lanoci

- Gemmell - said Guttmann looks familiar

- as a guy who has come to Bar

only one
who
could
ID Guttmann
as customer

1. Fingerprints - cat ID print & w/ any
given suspect

1-11-66

3/18/77

3:50 p.m.

call from AUSA Ed Thompson
(1) He has movie film of approach
of Reimer to Doll House & I want to
view it. - I'll be able to on
3/23. - This is 1st & I've
been notified of movie

(2) Wants to talk stipulation re
chain of custody - certain evid -
ie - bottles, phone book - cell
phone book? - what relevance to
case?

(3) He will have handwriting expert in
(hopefully on 3/23/77) re his state-
ment in report. - prints not
identifiable as anyone's rather than as
subjects.

(4) I asked that all photos
taken be available on 3/23 - I'd
like to use some perhaps - He
might enlarge for me

(5) I wanted all copies involved
available. Thompson said they

(6) Note - on 3/23 - Ask Thompson to
agree to Hagstrom map in evidence.
* See if can get an opaque projector &
screen.

(7) He indicated trial probably won't begin
until following week.

3/21/77

Call from Edw. Thompson - (a) Wants to put
note re confl. of int on record - I intended
to do that any way

(b) Fingerprint effort coming Thursday

Re (a) above - any prob. w/ statements of
Gittens & phone book of Rausci?

I asked Thompson how he would hope
to use phone book. - Thompson
indicated name of owner of Rising
Star talent agency & Genies Bar (supplied)
in book - These are in competition
w/ A&P & Doll House - This could
provide motive re Rausci & firebombing.

TRF:MT:jb
2.763,429

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - X

UNITED STATES OF AMERICA

AFFIDAVIT IN OPPOSITION

- against -

76 CR 714

PETER FRANK GIATTINO and
PASQUALE RAUCCI,

Defendants.

- - - - - X

STATE OF NEW YORK

COUNTY OF KINGS

)
) SS.:
)

EDWARD THOMPSON, JR., being duly sworn deposes and

says:

1. That at all times herein I was an Assistant United States Attorney duly appointed according to law and serving as such. This affidavit is submitted in opposition to defendants' motion for judgment of acquittal.

2. On December 16, 1976 the case of United States v. Giattino and Raucci 76 CR 714 was reassigned from Assistant United States Attorney Woodfield to deponent. Motions were then returnable January 5, 1977 before the Honorable George C. Pratt, United States District Judge at Westbury, New York.

3. Extensive informal discovery between counsel was conducted on January 4 and 5, 1977 pursuant to Rules of this court and Rule 16, Federal Rules of Criminal Procedure. The names then known by the government of all employees of the Doll House for several months before the offense including Carol Fein, as well as the identities of the owners of the premises and all other known tenants were provided to the defense. At the conclusion of this latter session counsel agreed that discovery was substantially completed. *Not So - 1/15/77*

1/15/77